Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

DAVID E. RIDENOUR; JEFFREY B. PETERS; MARK GRAF,
Petitioners,

v.

UNITED STATES OF AMERICA; KAISER-HILL COMPANY, L.L.C.; WACKENHUT SERVICES LIMITED LIABILITY COMPANY; EG&G ROCKY FLATS, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether under the False Claims Act, 31 U.S.C. § 3729 *et seq.*, the Government must show good cause to intervene after initially declining to intervene, as specifically set forth in 31 U.S.C. § 3730(c)(3)?

2. Whether the False Claims Act effectively allows the Government unreviewable prosecutorial discretion to dismiss a case, at any time, for any theoretically conceivable reason related to a governmental interest, contrary to legislative intent?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners are David E. Ridenour, Jeffrey B. Peters, and Mark Graf.

Respondents are the United States of America, Kaiser-Hill Company, L.L.C., Wackenhut Services Limited Liability Company, and EG&G Rocky Flats, Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioners David E. Ridenour, Jeffrey B. Peters, and Mark Graf respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is published at 397 F.3d 925 and appears in the Appendix of this Petition ("App.") at 1a-31a. The district court's memorandum opinion granting the Government's motion to dismiss based upon the magistrate's recommendation is published at 174 F. Supp. 2d 1147 and appears at App. 32a-37a. The magistrate's recommendation is published at 174 F. Supp. 1149 and appears at App. 38a-76a.

JURISDICTION

The court of appeals entered judgment on February 9, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS OF STATUTORY LAW

The relevant statutory provision is Section 3730(c) of the False Claims Act, 31 U.S.C. § 3730(c), which provides:

(c) Rights of the parties to *qui tam* actions.

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right

to continue as a party to the action subject to the limitations set forth in paragraph (2).

(2) (A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as--

(I) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

STATEMENT OF THE CASE

This case presents critical questions involving statutory interpretation and application of the False Claims Act. First, the Tenth Circuit, in direct conflict with statutory language and legislative intent allowed the Government to dismiss a case without first showing good cause for intervention, after

it had initially declined to intervene. Second, the Tenth Circuit, in conflict both with legislative intent and a Ninth Circuit opinion it purported to apply, provided the Government with an essentially unreviewable prosecutorial discretion standard allowing the dismissal of any False Claims Act case at any stage of the proceedings.

The net effect of the Tenth Circuit's decision is to allow the Government to dismiss a *qui tam* case at any time, for any theoretically conceivable reason, even well after it originally declined to intervene. In this case, the Government moved to dismiss three years after the complaint was filed, and almost a year after the Government declined to intervene, for reasons that the Government admitted were present when the case was filed. (App. at 21a). If allowed to stand, the Tenth Circuit decision will have a unwarranted chilling effect on *qui tam* cases because any case would be subject to summary dismissal at the whim of the Government at any time. The Tenth Circuit opinion would also allow the Government to obtain judicially what it failed to obtain legislatively – an unreviewable discretion to dismiss any *qui tam* case at any time.

Factual Background

This appeal arises out of the dismissal of a *qui tam* action that exposed deficient security at Rocky Flats, one of the federal government's major nuclear weapons manufacturing sites. Despite claiming to furnish – and billing the government enormous sums for furnishing – security according to mandatory Department of Energy (DOE) specifications, the three defendant contractors allowed amazingly lax or non-existent security to persist for years at Rocky Flats, endangering national security and making that

facility and the surrounding population vulnerable to terrorism and other security risks.

This action was not dismissed because it lacks merit. To the contrary, the Government stipulated for purposes of the hearing that Petitioners' claims have merit. (App. at 6a). It was not dismissed because the Government took over the case and reached a settlement eliminating the deficiencies in security at Rocky Flats. To the contrary, the case was dismissed without any commitment by the contractors to cure those deficiencies. It was dismissed when, almost three years after the case was filed and almost a year after the Government declined intervention, the Government changed its mind and, without intervening, proffered two purely theoretical justifications for dismissal: (1) the lawsuit could potentially delay cleanup of the Rocky Flats site, and (2) proving some of the Petitioners' claims could potentially involve the use of low level classified documents, which could potentially cause a security risk. (App. at 36a). The Government gave no explanation of why it had waited three years to raise issues of dubious validity that it acknowledged had been present from the filing of the initial complaint, and had never been discussed with Petitioners. (App. at 66a).

Security at the Rocky Flats site is critical. Rocky Flats is less than sixteen miles from downtown Denver, and at the time this case was filed, had more than fourteen tons of weapons grade plutonium and six tons of highly enriched uranium. (App. at 4a-5a). The DOE has been billed and paid annually more than $50 million for security at Rocky Flats. Petitioners David Ridenour, Jeffrey Peters and Mark Graf all worked at the Rocky Flats site either providing or overseeing security. (App. at 39a-40a). David Ridenour was DOE Director of Safeguards and Security at the Rocky Flats Field Office, responsible for overseeing contractor security of

Special Nuclear Material at Rocky Flats. *Id.* Jeffrey Peters was formerly Director of Protective Force Operations at Rocky Flats, overseeing a uniformed protective force of approximately 500. *Id.* Mark Graf was a lieutenant in the Protective Force at Rocky Flats. *Id* Each Petitioner independently raised concerns about security at Rocky Flats before the filing of their *qui tam* action. Each had been either constructively discharged or involuntarily reassigned and demoted for suggesting that, despite DOE's public position over the years, weapons grade plutonium has been placed at high risk, endangering the citizens of Colorado.

On October 8, 1997, the Petitioners filed suit as *qui tam* relators under the False Claims Act, alleging that defendants EG&G, Wackenhut and Kaiser-Hill were paid for security measures they either did not provide or provided below acceptable levels under applicable regulations and contracts. (App. at 4a). In addition to general allegations regarding the overall standard of security, Petitioners presented specific and discrete allegations of false claims relating to security. (App. at 42a, n. 4). At no point – in its motion to dismiss or at the evidentiary hearing – did the Government attack these specific allegations. At the evidentiary hearing, the Government stipulated for purposes of the hearing that the Petitioners' claims were meritorious. (App. at 6a).

On December 14, 1999, the Government notified the district court that it had decided not to intervene, and the case was unsealed. (App. at 5a). While Government declination sometimes leads relators to dismiss, in this case the Petitioners had conclusive evidence of wrongdoing, and were determined to proceed. Following service of the lawsuit, the defendant contractors filed motions to dismiss, which the Petitioners withstood and which the court denied. Then, on August 21, 2000, almost three years after the filing of the

complaint, the Government filed a motion to dismiss Petitioners' action without reaching the merits of their claims. (App. at 5a).

The magistrate recommended that an evidentiary hearing be held on the motion to dismiss, and the district court accepted the recommendation. But in rulings made shortly before the July 2001 hearing, the magistrate ruled, *inter alia*, that the Petitioners could not conduct discovery regarding the motion to dismiss, that the Petitioners could not subpoena the testimony of the Government's "person most knowledgeable" about the reasons for the dismissal, and that the deliberative process privilege would apply. (App. at 22a-25a). In the end, the magistrate and the district court employed an extremely deferential standard of review that amounted to this: if there was any conceivable theoretical possibility that this lawsuit could delay cleanup of the Rocky Flats site even for a day, *or* if there was any conceivable theoretical possibility that proving even one element of one of the Petitioners' claims or the contractors' defenses could involve the use of even one classified document, then the case would have to be dismissed outright.

The practical effect of the magistrate's determinations was that Petitioners were required to negate every conceivable theoretical possibility that the lawsuit would delay Rocky Flats cleanup or entail the use of classified documents. (App. at 36a). The resulting "evidentiary" hearing was a sham, because no evidence could ever alter a result that was dictated by mere theoretical possibilities.

On August 7, 2001, the magistrate recommended that the United States' motion to dismiss be granted. (App. at 32a). The court accepted that recommendation on September 27,

2001 and dismissed the action. (App. at 37a). Petitioners filed a timely notice of appeal on October 31, 2001.

Decision of the Court of Appeals

A divided panel of the Tenth Circuit affirmed. The majority opinion: 1) held there was no requirement of intervention with a showing of good cause prior to dismissal; and 2) purported to adopt the standard for dismissal set forth by the Ninth Circuit in *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998), and held that the Government in this case met that standard. (App. at 10a-11a, 18a-22a). The minority opinion, dissenting in part and concurring in part and in the result, held that under a plain reading of the False Claims Act the Government was required to intervene upon a showing of good cause after it had declined to intervene during the seal period. (App. at 26a-31a). But the minority opinion believed the Government did show good cause through its theoretical bases for dismissal. *Id.*

REASONS FOR GRANTING THE PETITION

Review by this Court of the decision of the Tenth Circuit is necessary to ensure that the statutory and legislative intent of the federal False Claims Act is enforced. The False Claims Act was designed to encourage assistance from private citizens in bolstering the Government's fraud enforcement effort. *See* S. Rep. No. 99-345, at 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266. If the Tenth Circuit's decision is permitted to stand, this policy would be severely undermined. Private citizens considering the substantial investment of time and resources needed to bring a *qui tam* suit would rightly think twice about doing so if, years after declining intervention, the Government could undo it all and dismiss a meritorious case for purely theoretical reasons.

Both statutory construction and legislative intent require that: 1) the Government, after declining to intervene in a FCA case, must show good cause for later intervention; and 2) dismissal by the Government, following an initial declination, must be subject to a meaningful, probing, and substantive review.

I. The Court Should Clarify that the Government Must Intervene to Dismiss a *Qui Tam* Case After Initially Declining to Intervene, in Accordance with the Terms of the False Claims Act Statute and Legislative Intent

The Tenth Circuit minority opinion recognized that the clear language of the False Claims Act requires the Government to intervene after it initially declined to intervene. (App. at 26a-31a). To the extent there is any ambiguity, the legislative history also supports this interpretation, given that prior to 1986, the Government had

absolutely no right to intervene after originally declining intervention, and the 1986 amendments added a provision for late intervention by the Government only for limited purposes to the benefit of relators.

A. The False Claims Act Allows the Government to Intervene Only Upon a Showing of Good Cause, Having Initially Declined Intervention.

Petitioners' first issue for review presents a question of statutory interpretation to which this Court should apply a *de novo* standard of review. *See United States v. Pemco Aeroplex, Inc.*, 195 F.3d 1234, 1236 (11th Cir. 1999)(questions of statutory interpretation under the False Claims Act should be reviewed *de novo*).

The False Claims Act, 31 U.S.C. § 3729 *et seq.*, is structured to provide for two different scenarios: suits in which the Government chooses to intervene, and suits in which it declines to do so. The authority granted to the Government and the relator depends upon which of these scenarios applies. The Act requires a relator to file the complaint and written disclosure *in camera*, and to serve a copy on the Government. The Government then has a period of 60 days (with possible extensions granted by the court) to notify the court that it intends to proceed with the action or that it declines to take over the action. The remainder of § 3730 sets out the intervention and non-intervention scenarios.

Sections 3730(c)(1) and (2) govern actions in which the Government elects to intervene and take over. Under these sections, the Government bears primary responsibility for prosecuting the action, may dismiss the action after the person initiating it has been provided with an opportunity for a

hearing, may settle if the court determines after a hearing that the proposed settlement is "fair, adequate, and reasonable under all the circumstances," and may show reasons for limiting the participation of the person initiating the action. As this Court recognized in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 769 (2000), if the Government intervenes within the 60 days, "it assumes primary responsibility for prosecuting the action, § 3730(c)(1), though the relator may continue to participate in the litigation and is entitled to a hearing before voluntary dismissal and to a court determination before settlement. § 3730(c)(2)."

Section 3730(c)(3) governs actions in which the Government elects not to intervene within the prescribed period. Under this Section, the person initiating the action has the right to conduct the action, but, upon request, must serve the Government with a copy of all pleadings. Finally, it provides: "When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the government to intervene at a later date upon a showing of good cause." This Court recognized in *Vermont* that, "if the Government declines to intervene within the 60-day period, the relator has the exclusive right to conduct the action, § 3730(b)(4), and the Government may subsequently intervene only on a showing of 'good cause,' § 3730(c)(3)." *Vermont*, 529 U.S. at 769, 120 S. Ct. at 1861.

By the terms of § 3730, the Government's right to dictate how the action will be prosecuted, whether it will be dismissed or settled, and what the role of the relator will be all hinge on the Government's intervention decision. Before seeking dismissal of the proceeding pursuant to § 3730(c)(2), the Government must obtain the rights set forth under

§ 3730(c)(1) and (2) by showing "good cause" to intervene "without limiting the status and rights of the person initiating the action." *See United States ex rel. Haskins v. Omega Institute, Inc.*, 11 F. Supp. 2d 555, 561-62 (D.N.J. 1998)("Where the government declines to so intervene, it cannot compromise plaintiff's claim, even if it settles its own claim against a contractor."); *United States ex rel. Smith v. Gilbert Realty Co.*, 9 F.Supp.2d 800, 802 (E.D.Mich. 1998)(citations omitted)(in cases where the Government elects not to intervene, the court "may nevertheless permit the Government to intervene at a later date upon a showing of good cause," but "in permitting late intervention, the court may not limit the 'status and rights of the relator.'").

The Tenth Circuit majority cites cases that suggest the Government need not intervene to seek dismissal. (App. at 12a-13a). The primary case cited involved a motion to dismiss *prior to* declining intervention, during the seal period, which is an entirely different statutory scenario, as discussed above. *See Swift v. United States*, 318 F.3d 250 (D.C. Cir.), *cert. denied*, 539 U.S. 944 (2003) (dismissal during seal period). The other cited cases involved ill-considered *dicta* that "simply ignore the language in 31 U.S.C. § 3730(c)(3) that the court may permit late intervention 'without limiting the status and rights of the person initiating the action." (App. at 30a-31a): *See United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 753 n. 10 (9th Cir. 1993) (dicta, based upon dicta in *Juliano*); *Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998) (dicta, based upon dicta in *Kelly)*; *Friedman v. Rite Aid Corp.*, 152 F. Supp. 2d 766, 772 (E.D. Pa. 2001) (dicta in case where Government declined to intervene, and defendant moved to dismiss); *Juliano v. Fed. Asset Disposition Ass'n*, 736 F. Supp. 348, 351 (D.D.C. 1990), *aff'd*, 959 F.2d 1101 (D.C.

Cir. 1992) (dicta, in case with dismissal of some defendants concurrent with intervention).

As pointed out by the Tenth Circuit dissent, and as is clear from the statute, to hold that the Government need *not* intervene after it originally declined intervention "eviscerates the provision addressing late intervention." (App. at 28a). *See Freytag v. Commissioner of Internal* Revenue, 501 U.S. 868, 877 (1991) (court must avoid statutory interpretation that would "render superfluous other provisions in the same enactment.").

B. The Legislative History of the 1986 False Claims Act Amendments Supports a Requirement of Intervention In this Case.

As discussed above, the statute is clear that the Government, after originally declining to intervene, must intervene to seek dismissal of a False Claims Act case. No resort to legislative history is therefore necessary or appropriate. *See Bedroc Ltd. v. United States*, 541 U.S. 176, 186-87 124 S. Ct. 1587, 1595, 158 L. Ed. 2d 338 (20 (2004). However, to the extent it appears there is an ambiguity, a review of legislative history is appropriate, and confirms that intervention is required. *Id.* (resort to statutory history appropriate where there is an ambiguity).

Prior to the substantial 1986 Amendments to the False Claims Act, the Government was not permitted to intervene *at all* after expiration of the initial review period. In adding a late intervention right to the 1986 Amendments, Congress made clear the intent that such a right was intended to be exercised only for limited and legitimate purposes, such as newly discovered evidence. The Senate Report states:

> Under current law, the Government is barred from reentering the litigation once it has declined to intervene during this initial [60-day time] period. The Committee recognizes that this limited opportunity for Government involvement could in some cases work to the detriment of the Government's interests. **Conceivably, new evidence discovered after the first 60 days of the litigation could escalate the magnitude or complexity of the fraud, causing the Government to reevaluate its initial assessment or making it difficult for the *qui tam* relator to litigate alone. In those situations where new and significant evidence is found and the Government can show "good cause" for intervening, paragraph (2) provides that the court may allow the government to take over the suit.**

S. Rep. No. 99-345, at 26-27 (1986) *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291 (emphasis added).

In *United States ex rel. Stone v. Rockwell International*, 950 F. Supp. 1046 (D.Colo. 1996), the court considered the significance and import of this legislative history. In *Stone*, the Government sought to intervene in a *qui tam* action against *Rockwell* International relating to its cleanup of the Rocky Flats site. The intervention motion was supported by the relator. The Government argued that it had "good cause" to intervene based on information obtained through discovery in a related proceeding and from information developed by the relator. *Id.* at 1048. In determining whether "good cause" was present, the court reviewed the legislative history of the 1986 Amendments, and found that they were passed "to strengthen the qui tam provisions to make them 'a more effective vehicle for private individuals to disclose fraud' which was thought to be necessary 'both for meaningful fraud

deterrence and for breaking the current "conspiracy of silence" among Government contract employees.'" *Id.* at 1049 (citations omitted). The court concluded that the "good cause" language in the 1986 Amendments was "intended to protect the interests of the relator" because "Government intervention late in the proceedings may be unfair to a relator who has expended considerable resources to advance the case and then lose up to half of the reward for bringing the action." *Id.* The court granted the Government's motion to intervene only after finding that it was based on new evidence.

II. The Court Should Clarify the Standard For Government Dismissal of False Claims Act Cases Where the Government Initially Declines to Intervene.

The False Claims Act is silent with regard to the standard to be applied by a court in reviewing a Government motion to dismiss. *Sequoia*, 151 F.3d at 1145. The Tenth Circuit opinion adopts a standard that allows the Government to dismiss a case, at any time, for any theoretically conceivable reason related to a governmental interest, essentially giving the Government unreviewable prosecutorial discretion in False Claims Act cases, contrary to legislative intent and prior judicial determination.

A. The Legislative History Evidences a Clear Intent that Relators and the Court Should Act as a Check on Unwarranted Dismissals and Failures to Prosecute.

The 1986 Amendments to the False Claims Act were intended "to encourage any individual knowing of Government fraud to bring that information forward." Sen. Rep. No. 99-345, at 2 (1986), reprinted in 1986

U.S.C.C.A.N. 5266, 5267-68. The legislative history to the House version of the Amendments Act states that the Bill "preserves and strengthens the role of the person initiating the action even if the Government enters the case." 132 Cong. Rec. 29321 (Glickman). One of the reasons for providing a *qui tam* relator full party status even after intervention was to "keep pressure on the Government to pursue the case in a diligent fashion" and to further the Act's purpose in "deputiz[ing] ready and able people who have knowledge of fraud against the government to play an active and constructive role through their counsel to bring to justice those contractors who overcharge the government." 132 Cong. Rec. 29322 (Glickman). The Senate Report states that the False Claims Amendments Act of 1986 "provides qui tam plaintiffs with a more direct role . . . in acting as a check that the Government does not neglect evidence, cause undue delay, or drop the false claims case without legitimate reason." S. Rep. No. 99-345, at 25-26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291.

Given the legislative history of the 1986 amendments, it would be contrary to legislative intent for courts to adopt a standard allowing for Government dismissal of *qui tam* cases at any stage of the proceedings, for virtually any reason. How can the relator act as a check upon the Government, if the Government can dismiss a case at will? How are individuals encouraged to come forward, if their time and effort is rendered futile at the unchecked whim of the Government?

B. The *Sequoia* Standard is Improper in a Post-Declination False Claims Act Case.

The *Sequoia* court acknowledged that "[t]he *qui tam* statute itself does not create a particular standard for

dismissal," so the court proceeded to create one of its own. *Sequoia*, 151 F. 3d at 1145. The standard for dismissal created in *Sequoia* was a two step analysis: (1) identification of a valid government purpose; and (2) a rational relation between dismissal and accomplishment of the purpose. If the Government satisfies the two-step test, the burden switches to the relator to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal. *Id.* The resulting standard is flawed, particularly as applied in this case, because it does not sufficiently test whether the Government legitimately has "good cause" for an eleventh-hour dismissal. The Tenth Circuit majority opinion ignores the "good cause" requirement, while the minority opinion conflates the "good cause" requirement with the *Sequoia* standard, which is also improper.

Cases interpreting "good cause" in other contexts are instructive in deciding what "good cause" means in this context. While the types of cases employing a "good cause" standard are diverse, they all involve actual meaningful review by the trial court of the reasons asserted. *See, e.g.*, *United States v. Ramone*, 218 F.3d 1229, 1236 (10th Cir. 2000), *cert. denied*, 531 U.S. 1026, 121 S.Ct. 598 (noting that "good cause for late filing [under Fed. R. Evid. 412] may be shown through newly discovered evidence that could not have been obtained at an earlier time through due diligence."); *United States v. Blaze*, 143 F.3d 585, 593 (10th Cir. 1998)(to justify substitution of counsel in a criminal case, "the defendant must show good cause, such as a conflict of interest, a complete breakdown of communication or an irreconcilable conflict which leads to an apparently unjust verdict"); *Despain v. Salt Lake Area Metro Gang Unit*, 13 F.3d 1436 (10th Cir. 1994)(lack of prejudice to defendants, mistake of counsel, and severe prejudice to plaintiffs are not sufficient to constitute "good cause" under former Fed. R.

Civ. P. 4(j) in order to excuse plaintiffs' failure to timely serve a complaint).

The foregoing cases reveal two instructive themes pertaining to "good cause." First, "good cause" is not demonstrated merely by its assertion – the movant must prove it. Second, "good cause" is equivalent to a valid reason and the validity of a proffered reason cannot be determined unless the movant's proof is scrutinized carefully. In a False Claims Act case, the Government should be required to establish by sufficient evidence that its asserted reasons for seeking late intervention to dismiss constitute "good cause," that is, a valid justification for the dismissal.

By holding that the Government's reason for dismissal need only be "rationally related" to a legitimate governmental purpose, the Tenth Circuit and *Sequoia* settle for a standard that falls short of requiring "good cause." A party's reason for accomplishing an objective can be rationally related to the objective without being a plausible or compelling reason for accomplishing that objective. It also may be rationally related to the objective without being the real motivation for the party's request. A mere theoretical or conceivable connection between the stated reason and the stated objective may be sufficient to satisfy a "rational relationship" standard, even without a showing that the reason was real or plausible. But that does not fit a situation involving a late attempt by the Government to dismiss a False Claims Act action and terminate the relators' substantive rights.

In this situation, more than a theoretical or conceivable connection between the Government's stated reason for dismissal and its stated objective should be required. The validity of the proffered reason must be probed. This entails examining whether the proffered reason is real and plausible.

In other words, does the evidence show, more likely than not, that it is the Government's actual motivation or merely pretextual? By adopting the "rational relationship" analysis from *Sequoia*, the Tenth Circuit failed to require the Government to show that there was "good cause" for the proposed intervention and dismissal.

C. The Court Should Set a Standard for Dismissal Following Late Intervention That Tests Whether "Good Cause" Exists.

In a concededly meritorious case such as this, factors to be considered in determining whether there is "good cause" for late intervention and dismissal should include, without limitation: (1) the timeliness of the decision to intervene and seek dismissal and the prejudice to relators; (2) whether newly discovered evidence or a change in circumstances supports the late intervention and dismissal; (3) whether the Government's asserted reasons for the dismissal further a legitimate Governmental purpose and whether there is a real and plausible relationship, not merely a theoretical or conceivable relationship, between that legitimate Governmental purpose and the asserted need for dismissal; and (4) whether the Government's decision to intervene and seek dismissal was influenced by a conflict of interest, undue influence, or other improper motives.

I. The Timeliness of the Decision and the Prejudice to Relators

The first factor in the inquiry that should be undertaken by the court in determining whether "good cause" is present and whether the rights and status of relators would be limited by intervention is comparable to the inquiry it would undertake for a motion for permissive intervention under Fed. R. Civ.

P. 24(b). *See Stone*, 950 F. Supp. 1046 (D. Colo. 1996) (analyzing Government intervention in *qui tam* under 3730(c) and Rule 24(b)). Under Rule 24(b), a court is granted discretionary power to permit intervention if the motion is timely and after considering "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *See Massachusetts School of Law v. United States*, 118 F.3d 776, 783 n. 5 (D.C. Cir. 1997) *modified*, 135 F.Supp.2d 28 (D.D.C. 2001); *United States v. Mississippi*, 958 F.2d 112, 116 (5th Cir. 1992).

For example, in this case, the Government knew of its alleged interests from the filing of the complaint. It could have sought dismissal at that time, but instead waited almost three years to seek dismissal, with no explanation for the delay. The resulting prejudice to Petitioners was significant: they expended substantial time and resources both during the period this case was under seal and during the period after the Government declined intervention.

ii. New Evidence or Change in Circumstances.

As stated above, the legislative history to the 1986 Amendments of the Act reveals that the Act's inclusion of an intervention right after the initial review period was intended to allow the Government to intervene after it "reevaluate[d] its initial assessment" where "new and significant evidence is found." Sen. Rep. No. 99-345 (1986) at 26-27. This should be one of the factors focused upon.

iii. A Real or Plausible Relationship Between a Legitimate Governmental Purpose and the Asserted Need for Dismissal.

The courts in this case accepted the Government's assertion that dismissal was rationally related to the need to protect national security and prevent delay in closing Rocky Flats. In a late intervention case, however, if the relator's rights are truly to act as a check against unwarranted dismissal or failure to prosecute, more is needed. The Government should be required to show a real or plausible relationship, as opposed to a mere theoretical relationship, between the asserted reasons for dismissal and a legitimate government interest.

iv. Conflicts of Interest, Undue Influence, and Other Improper Motives.

The standard of review for a Government decision to dismiss should be less deferential where there is an apparent conflict of interest, or undue influence, or evidence of other improper motives. *See Chambers v. Family Health Plan Corp.*, 100 F.3d 818, 825 (10th Cir. 1996)(applying a sliding scale of deference to ERISA administrator decisions, decreasing the level of deference in proportion to the severity of the conflict).

D. Even Were The *Sequoia* Standard Appropriate in This Case, the Courts Below Improperly Construed the Standard, Essentially Giving the Government the Unreviewable Prosecutorial Discretion Denied By Congress and By The *Sequoia* Court.

The district court and the Tenth Circuit misapplied the *Sequoia* standard. They equated the *Sequoia* standard with

"the rational basis review of administrative action or statutory classification." (App. at 18a, 35a-36a). Under this standard, as the district court noted, "the actual purpose of the state action at the time of the action is irrelevant." *Id.* The court held that "the government here met its burden under the rational relationship standard when it identified legitimate government interests and showed that there was a rational (even if not certain) relationship between accomplishment of those purposes and dismissal." *Id.*

The standard applied in this case was in effect an "unreviewable exercise of discretion" standard for review of prosecutorial decisions, which *Sequoia* expressly rejected. *United States ex rel. Sequoia v. Sunland Packing House*, 912 F. Supp. 1325, 1339 (E.D. Ca. 1995) The *Sequoia* court found that "[n]othing in the legislative history or the amendments themselves suggest that Congress amended the bill to give the Department of Justice authority to dismiss False Claims Act cases arbitrarily or for illegitimate reasons. To so interpret the law would in large measure defeat the express purpose of the False Claims Act. Congress intended to increase the role of the relator in False Claims Act litigation 'to keep pressure on the Government to pursue the case in a diligent fashion.'" *Id.* (citations omitted).

The district court also misapplied the "arbitrary and capricious" component of the *Sequoia* standard to require relators to "negate every conceivable basis that could support the government's decision to dismiss" or "to show that fraudulent or illegal purposes were the true motivations behind that decision." (App. at 36a). In setting forth this interpretation of the *Sequoia* "arbitrary and capricious" component, the district court cited *Federal Communications Commissions v. Beach Communications, Inc.*, 508 U.S. 307 (1993) and *Crider v. Board of County Commissioners of*

Boulder County, 246 F.3d 1285 (10th Cir. 2001), cert. denied, 122 S.Ct. 205 (2001). (App. at 35a-36a).

Both *Beach Communications* and *Crider* are distinguishable from this case, and if applied to late intervention False Claims Act cases, again lead to an unreviewable prosecutorial discretion standard. *Beach Communications* involved the review of legislative action. The Court applied an extremely deferential standard to review the legislature's action, concluding: "only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function." *Beach Communications*, 508 U.S. at 315 (citations omitted). In *Crider*, the Court held that the "Supreme Court has narrowed the scope of substantive due process protection in the zoning context so that such a claim can survive only if the alleged purpose behind the state action has no conceivable rational relationship to the exercise of the state's traditional police power through zoning." *Crider*, 246 F.3d at 1289 (citations omitted).

In the False Claims Act context, the standard for judicial review of the Government's decision to seek dismissal is distinguishable both from the standard for judicial review of a legislative enactment set forth in *Beach Communications* and from the standard for judicial review of a zoning ordinance set forth in *Crider*. The policies supporting deference to legislative actions do not apply to decisions by the Department of Justice in the context of the False Claims Act.

"The arbitrary and capricious standard is sufficiently flexible to allow a reviewing party to adjust for the circumstances alleged . . . ." *Chambers v. Family Health*

Plan Corp., 100 F.3d at 827 (citations omitted). Under the False Claims Act, less deference should be accorded to the Government's decision to seek dismissal because of the policies underlying the False Claims Act, the Government's conflicts of interest, and the inherent lack of prior procedural safeguards in the Government's decision. *See, e.g., Friends of the Bow, Wyoming Outdoor Council v. Thompson*, 124 F.3d 1210, 1215 (10th Cir. 1997)(Administrative Procedures Act's procedures are designed to ensure that the agency "considered the relevant factors and that the choice it made based on those factors is a reasonable one."). Moreover, the Government's decision to seek dismissal is not the result of the impartial resolution of two adversarial points of view. *See, e.g., United States v. The Telluride Company*, 849 F. Supp. 1400, 1404 (D. Colo. 1994)(denying deference to the EPA because of the lack of an adversarial process between the EPA and the defendant: "the government's suggestion that I 'pay deference to the judgment of the government agency which has negotiated and submitted the proposed judgment' borders on the ludicrous. An agency's judgment is entitled to deference when it is based on reasoned decision-making. The reasons must be its own, not those of a well-heeled defendant.").

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: May 10, 2005

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 01-1510

[Filed, February 9, 2005]

DAVID E. RIDENOUR; JEFFREY B. PETERS; MARK GRAF, Plaintiffs-Appellants,	)
UNITED STATES OF AMERICA, ex rel., Plaintiff-Appellee,	)
v.	)
KAISER-HILL COMPANY, L.L.C., and Statutory Agent: Corporation Services Company; WACKENHUT SERVICES LIMITED LIABILITY COMPANY, and Statutory Agent: James A. Dierker; EG&G ROCKY FLATS, INC., and Statutory Agent: C.T. Corporation, Defendants-Appellees.	)

Before KELLY and O'BRIEN, Circuit Judges and EAGAN[1].

OPINION

O'BRIEN, Circuit Judge.

This is a *qui tam* action,[2] filed under the False Claims Act (FCA), 31 U.S.C. § 3729. David E. Ridenour, Jeffrey B. Peters, and Mark Graf (Relators) contend Appellees, security providers[3] at Rocky Flats Nuclear Weapons Plant (Rocky Flats), conspired to present for payment, knowingly presented, and were paid for, false claims for deficient, defective, or non-existent security measures, in violation of 31 U.S.C. § 3729(a)(1), (a)(2) and (a)(3). After declining to intervene, the Government filed a motion to dismiss the action, which the district court granted. *United States ex rel. Ridenour v. Kaiser-Hill Co., L.L.C.*, 174 F. Supp. 2d 1147 (D. Colo. 2001). Relators appeal.

Relators present several issues on appeal: (1) whether the district court applied the correct standard of review in granting the Government's motion to dismiss; (2) whether it erred in finding the Government met its burdens under the applied standard; (3) whether it erred in denying Relators'

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[1] The Honorable Claire V. Eagan, U.S. District Judge, Northern District of Oklahoma, sitting by designation.

[2] The Latin phrase "*qui tam*" is an abbreviation for "qui tam pro domino rege quam pro se ipso in hac parte sequitur," meaning, "who as well for the king as for himself sues in this matter." Black's Law Dictionary 1262 (7th ed. 1999).

[3] Kaiser-Hill Company, L.L.C.; Wackenhut Services, L.L.C.; EG & G Rocky Flats, Inc.

request to conduct certain discovery in preparation for hearing on the Government's motion to dismiss, their request to subpoena the Government's person most knowledgeable about the decision to seek dismissal, and their request to inquire at the hearing into the reasons underlying the dismissal decision; and (4) whether it erred in allowing the Government to present evidence refuting certain of the Relators' allegations where the parties had stipulated Relators' claim had merit. We exercise jurisdiction pursuant to 28 U.S.C. § 1291[4] and affirm.

FACTUAL BACKGROUND

The Department of Energy (DOE) operated Rocky Flats[5] as a nuclear weapons manufacturing facility from 1953

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[4]Originally, the district court only dismissed with prejudice Relators' two counts brought under 31 U.S.C. § 3729(a)(1), (a)(2) and (a)(3). The court dismissed without prejudice their constructive discharge claim in violation of 31 U.S.C. § 3730(h). Relators filed their appeal before the resolution of this third claim. To cure this jurisdictional defect, they voluntarily dismissed with prejudice the constructive discharge claim. Because all claims that were presented to the district court are resolved, we have jurisdiction to hear this appeal.

[5] Rocky Flats and its operators have been involved in several other actions before us, dealing in some manner with nuclear contamination problems. *See United States ex rel. Stone v. Rockwell Int'l Corp.*, 282 F.3d 787, 92 Fed. Appx. 708 (10th Cir. 2002) (*qui tam* action charging environmental violations); *Brever v. Rockwell Int'l Corp.*, 40 F.3d 1119 (10th Cir. 1994) (employees alleged retaliation for cooperating with the FBI in its investigation of environmental crimes); *Building & Constr. Dep't v. Rockwell Int'l Corp.*, 7 F.3d 1487 (10th Cir. 1993) (employees presented medical monitoring claim for exposure to unsafe levels of radioactive and

through 1992. Rocky Flats is located near Golden, Colorado. In 1989, the Environmental Protection Agency (EPA) designated the by-then radiologically-contaminated facility a CERCLA[6] Superfund[7] site. The site is to be decontaminated and closed by 2006.

Between 1989 and 1995, EG&G Rocky Flats, Inc., was the primary contractor with DOE for management and operations at Rocky Flats, which included security. During these same years, Wackenhut Services, L.L.C., contracted directly with the DOE to provide security at the site. In 1995, the DOE awarded Kaiser-Hill Co., L.L.C., the environmental cleanup contract at Rocky Flats. Since 1995, Kaiser-Hill has subcontracted the security portion of its contract to Wackenhut.

Relators performed security work at Rocky Flats, and each Relator independently voiced his concern about what he perceived as weak security. They ultimately filed suit as *qui tam* relators under the FCA on October 8, 1997, alleging EG&G, Wackenhut, and Kaiser-Hill were paid for security measures they either did not provide or provided below acceptable levels. At the time of the filing, Rocky Flats

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hazardous substances); *McKay v. United States*, 703 F.2d 464 (10th Cir. 1983) (land owners adjacent to Rocky Flats sued for damage to property caused by nuclear contaminants).

[6] CERCLA is the acronym for the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601, *et seq*.

[7] Sites listed as CERCLA priority are entitled to EPA cleanup funding under a general federal fund for hazardous waste management. 42 U.S.C. § 9611; 26 U.S.C. § 9507.

housed more than fourteen tons of weapons grade plutonium and six tons of highly enriched uranium. The Government requested and received several time extensions from the district court, totaling two years, in which it investigated the merits of the *qui tam* action. Pursuant to 31 U.S.C. § 3730(b)(2) and (b)(3), the case remained under seal during this investigation. Ultimately, the Government declined to intervene and the case was unsealed on December 14, 1999.

On April 13, 2000, the Government requested the DOE be added to the certificate of service to be kept aware of the progress of the suit. The Government became concerned about the handling of classified information and filed a status report concerning this issue on July 5, 2000. At a hearing on Defendants-Appellees' motion to stay proceedings pending the Government's resolution of classified information, the Government announced it would file a motion to dismiss, which it did on August 21, 2000.

The Government argued its motion to dismiss should be granted because the lawsuit would delay the cleanup and closure of Rocky Flats, as well as compromise national security interests by risking inadvertent disclosure of classified information. Relators opposed dismissal, claiming the Government was seeking dismissal for fraudulent and arbitrary and capricious reasons and the reasons for dismissal were not rationally related to a legitimate government purpose. They also argued the Government could not seek to dismiss the action without first intervening under 31 U.S.C. § 3730(c)(3). Relators sought discovery regarding the Government's stated reasons for dismissal and endeavored to subpoena the "most knowledgeable" government witness regarding the Government's reasons for dismissal. (Appellants' Br. at 2.) The district court denied these requests. After a five-day evidentiary hearing conducted

pursuant to 31 U.S.C. § 730(c)(2)(A), in which the Government stipulated for purposes of the hearing that the Relators' claims were meritorious, the magistrate recommended the Government's motion to dismiss be granted. The district court adopted the recommendation and dismissed with prejudice the claims considered in this appeal.

DISCUSSION

I. FCA claims

We review de novo the district court's interpretation of the FCA and its determination of what standard to apply to the Government when it moves to dismiss a *qui tam* action. *See Foutz v. United States,* 72 F.3d 802, 804 (10th Cir. 1995) (construction of federal statutes reviewed de novo). We review the district court's dismissal of a *qui tam* action with prejudice for abuse of discretion. *Stone*, 282 F.3d at 809.

A. The FCA's Purposes and Provisions

The purpose of the FCA "is to enhance the Government's ability to recover losses sustained as a result of fraud against the Government." S. Rep. No. 99-345, at 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266. It empowers a private individual (a relator) to bring a civil claim on his or her own behalf, and on behalf of the Government, against a person or company who knowingly presents a false claim to the Government for payment. 31 U.S.C. §§ 3729(a), 3730(a) and (b)(1). The relator can only dismiss the action upon written

consent of the court and the Attorney General.[8] § 3730(b)(1). Amended in 1986, the most substantial modifications to the FCA created an increased incentive for private individuals to bring *qui tam* suits and granted the Government greater control over these privately brought actions. Congress increased the relator's incentive[9] to bring *qui tam* actions by guaranteeing them a percentage of the recovery if the action is successful, and slightly increasing their maximum potential

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[8] Even where the Government has declined to intervene, relators are required to obtain government approval prior to entering a settlement or voluntarily dismissing the action. *See Searcy v. Philips Electronics N. Amer. Corp.*, 117 F.3d 154, 155 (5th Cir. 1997); *United States v. Health Possibilities, P.S.C.*, 207 F.3d 335, 339 (6th Cir. 2000) (section 3730(b)(1) provides the Government with an absolute veto of any proposed *qui tam* settlement because the plain language of the statute does not limit this right). *But see United States ex rel. Hullinger v. Hercules, Inc.*, 80 F. Supp. 2d 1234, 1240 (D. Utah 1999) (limiting relator's obligation to seek government approval of a settlement to the initial sixty days plus extensions); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Provident Life & Accident Ins. Co.*, 811 F. Supp. 346, 347 (E.D. Tenn. 1992).

[9] The increased incentives to private individuals have proven effective at helping the Government recover substantial sums of fraudulently obtained payments. From the effective date of the 1986 amendments to 2002, more than 3,000 *qui tam* cases were filed, resulting in nearly $5 billion in recovered monies from settlements and awards. Gregory G. Brooker, *The False Claims Act: Congress Giveth and the Courts Taketh Away*, 25 Hamline L. Rev. 373, 382-84 (Spring 2002). In just one fiscal year, from October 1, 2000, to September 30, 2001, relators received more than $210 million as part of their statutory share of the settlements and awards. *Id.* at 383 n.72.

recovery. S. Rep. No. 99-345, at 27 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5292. Relators are entitled to fifteen to twenty-five percent of the proceeds of the action or settlement of the claim if the Government intervenes. § 3730(d)(1). If the Government declines intervention, relators receive twenty-five to thirty percent. § 3730(d)(2). Relators are also given certain guarantees of involvement: if the Government proceeds with the action, the relators have the right to continue as a party, § 3730(c)(1); if the Government moves to dismiss the claim over relators' objections, they are entitled to a hearing, § 3730(c)(2)(A); and if the Government settles the claim, relators are entitled to judicial determination, via a hearing, that the Government's proposed settlement is fair, adequate, and reasonable, § 3730(c)(2)(B). S. Rep. 99-345, at 25-26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5290-91. *See also Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772, 146 L. Ed. 2d 836, 120 S. Ct. 1858 (2000) (Stevens, J., dissenting). These hearings, however, are only to be granted if relators can show a "substantial and particularized need for a hearing."[10] S. Rep. 99-345, at 26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291.

Through the 1986 amendments, Congress granted the Government additional opportunities to intervene and

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[10] It is not clear whether in practice this notice and hearing requirement has amounted to much of a hurdle for the government. However, we note that Congress apparently intended that the provision authorizing relators to formally object to any motions to dismiss or proposed settlements between the government and defendant should not pose a significant burden for the government or courts.
United States ex rel. Kelly v. Boeing Co., 9 F.3d 743, 754 n.11 (9th Cir. 1993).

increased its power to control *qui tam* actions. Under the old Act, the Government only had the initial sixty days in which to decide to intervene. The 1986 amendments allow the Government to obtain extensions beyond the initial sixty days in which to investigate the claims, and even if the Government initially declines to intervene, it can intervene later, at any time, upon a showing of good cause. S. Rep. 99-345 at 26-27 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291-92; 31 U.S.C. § 3730(b)(3) and (c)(3).

The FCA prescribes the process for a *qui tam* action. After the relator files, the complaint remains under seal for at least sixty days, plus any extensions, during which time the Government has the opportunity to investigate the claim and determine whether it wants to intervene. § 3730(b)(2) and (3). After the Government intervenes or declines to intervene, the complaint is unsealed and served on the defendant. § 3730(b)(3). If the Government intervenes, whether initially or later under § 3730(c)(3), it takes over the primary responsibility of prosecuting the action and is not bound by the relator's acts. § 3730(c)(1). If the Government intervenes, the relator retains the right to continue as a party, subject to certain limitations. *Id.* Not only may the Government limit a relator's involvement, it may also stay discovery, or pursue alternate remedies against the defendant. § 3730(c)(2)(C), (c)(2)(D), (c)(4), and (c)(5). If the Government declines to intervene in the action, the relators have the right to conduct the action, subject, however, to possible future intervention by the Government upon a showing of good cause. § 3730(c)(3). The Government can dismiss or settle the action despite the relator's objections. § 3730(c)(2)(A) and (c)(2)(B).

B. Intervention

At the outset, we consider Relators' argument that the Government must intervene under § 3730(c)(3) before moving to dismiss under § 3730(c)(2)(A).[11] The magistrate determined the FCA did not contain this requirement. The district court disagreed. Nonetheless, it construed the Government's motion to dismiss as including an implied motion to intervene, and identified as good cause for the motion the intent of the Government to dismiss the case.[12] We decline to construe the FCA as requiring intervention for cause before dismissal because a plain reading of the statute does not require it, canons of statutory construction do not support such a result,

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[11] This argument relates to our consideration of the correct standard of review for dismissal as follows. The Relators contend we should apply a good cause standard to the Government's motion to dismiss because this is the standard for late intervention. As they put it,

> It is impossible to analyze whether there is "good cause" for late intervention without also analyzing whether there is "good cause" for the dismissal that prompts the intervention. The False Claims Act's "good cause" provision should be interpreted to require a meaningful, probing and substantive review of the government's decision to seek dismissal.

(Appellants' Br. at 11.) Thus, in aid of resolving the issue of the correct standard of review to apply to the Government's dismissal, we first consider whether the Government must intervene under § 3730(c)(3) before moving to dismiss under § 3730(c)(2)(A).

[12] "Having decided . . . that the government may move to dismiss a meritorious case in which it initially declined to participate, it is an unavoidable conclusion that the movant has good cause to intervene to exercise that right." (Appellants' Br., Tab D at 5.)

and in our view, such a reading would render the FCA constitutionally infirm.

The FCA provides "the Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion." 31 U.S.C. § 3730(c)(2)(A). In interpreting this provision, we rely on a longstanding canon of statutory construction which we recently revisited in *NISH v. Rumsfeld*:

> As a general rule, statutory language is to be interpreted according to the common meaning of the terms employed. Our analysis of statutory construction must begin with the language of the statute itself, and [absent] a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.

348 F.3d 1263, 1268 (10th Cir. 2003) (quotation marks, citations and alteration omitted). Applying this canon, we identify nothing in the language of § 3730(c)(2)(A) to suggest the authority of the Government to dismiss a *qui tam* action is dependent upon prior intervention in the case. Nor can we identify legislative intent to the contrary. In fact, the Senate report incident to passage of the measure spelled out the purpose of late intervention.

> Under current law, the Government is barred from reentering the litigation once it has declined to intervene during this initial period. The Committee recognizes that this limited opportunity for Government involvement could in some cases work to the detriment of the Government's interests.

> Conceivably, new evidence discovered after the first 60 days of the litigation could escalate the magnitude or complexity of the fraud, causing the Government to reevaluate its initial assessment or making it difficult for the *qui tam* relator to litigate alone. In those situations where new and significant evidence is found and the Government can show 'good cause' for intervening, paragraph (2) provides that the court may allow the Government to take over the suit.

S. Rep. 99-345, at 26-27 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291-92. This language clearly suggests the purpose of late intervention is to pursue litigation, not dismiss it.

The D.C. Circuit has recently held the Government need not first intervene in a *qui tam* action before moving to dismiss it. Although the case concerned a government motion to dismiss during the seal period, the court's reasoning applies with equal force to a motion to dismiss filed after the seal period:

> [Section] 3730(b)(2) makes intervention necessary only if the government wishes to "proceed with the action." Ending the case by dismissing it is not proceeding with the action; to "proceed with the action" means, in the False Claims Act, that the case will go forward with the government running the litigation.

Swift v. United States, 355 U.S. App. D.C. 59, 318 F.3d 250, 251 (D.C. Cir.), *cert. denied*, 539 U.S. 944, 156 L. Ed.

2d 630, 123 S. Ct. 2622 (2003).[13] As we just noted, the purpose of late intervention, as with intervention in the seal period, is to proceed with the action. Other courts have agreed in dicta that prior intervention is not necessary to enable a government motion to dismiss. *See Juliano v. Fed. Asset Disposition Ass'n,* 736 F. Supp. 348, 351 (D. D.C. 1990), *aff'd,* 295 U.S. App. D.C. 97, 959 F.2d 1101 (D.C. Cir. 1992); *Kelly,* 9 F.3d at 753 n.10; United States ex rel. *Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998); *United States ex rel. Friedman v. Rite Aid Corp.*, 152 F. Supp. 2d 766, 772 (E.D. Pa. 2001).

Our holding comports with constitutional concerns as well. As the Supreme Court has instructed, "it is a cardinal principle of statutory interpretation . . . that when an Act of Congress raises a serious doubt as to its constitutionality, [we] will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Zadvydas v. Davis,* 533 U.S. 678, 689, 150 L. Ed. 2d 653, 121 S. Ct. 2491 (2001) (quotation marks omitted). The constitutionality of the FCA has been challenged several times under the claim it violates the separation of powers doctrine

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[13] The *Swift* court suggested the justification for dismissal would necessarily provide the good cause for intervention:

> In any event, the question whether the False Claims Act requires the government to intervene before dismissing an action is largely academic. As Swift conceded at oral argument, if there were such a requirement, we could construe the government's motion to dismiss as including a motion to intervene, a motion the district court granted by ordering dismissal.

318 F.3d at 252.

inherent in the Take Care Clause.[14] In this case, we examine whether the Government would be unconstitutionally hamstrung by a requirement, as urged by Relators, to intervene with a showing of good cause before moving to dismiss a *qui tam* action.

In a case where the Government successfully intervened upon a showing of good cause, we have previously held the *qui tam* provisions are constitutional under the Take Care Clause. *Stone*, 282 F.3d at 807. We expressly reserved the question of whether the *qui tam* provisions would pass constitutional muster if the Government was denied intervention for cause. *Id.* at 806 n.6. *Stone* cited favorably to decisions of other circuits that have uniformly held the FCA is constitutionally sound as long as it is interpreted as vesting in the Executive Branch sufficient control over *qui tam* actions so there is no violation of its duty to enforce the laws of the land. The Fifth Circuit has stated the Government retains sufficient control of a *qui tam* action to save the FCA from being unconstitutional because the Government can veto settlements without intervening, and it "retains the unilateral power to dismiss an action notwithstanding the objections of the person." *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 753 (5th Cir. 2001) (en banc) (quotation marks omitted). The Ninth Circuit has concluded the FCA does not violate the doctrine of separation of powers because the Government retains sufficient control over *qui tam* actions, including the power "albeit somewhat qualified, to end *qui tam* litigation." *Kelly*, 9 F.3d at 754. These limitations to which the *Kelly* court refers are the FCA requirements to give the relator

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[14] The Executive Branch is entrusted with the duty to "take Care that the Laws be faithfully executed . . . ." U.S. Const., art. II, § 3.

notice and a hearing. *Id.* at 753. The Sixth Circuit has also concluded the FCA scheme embraces sufficient provisions to assure the freedom of the Government to control a *qui tam* action. *United States ex rel. Taxpayers Against Fraud v. General Elec. Co.*, 41 F.3d 1032, 1041 (6th Cir. 1994). *See also Stevens*, 529 U.S. at 801 (history of *qui tam* action in England and America sufficient to establish it does not implicate Take Care Clause).

Although the *qui tam* provisions have thus far withstood constitutional challenge, we conclude that to condition the Government's right to move to dismiss an action in which it did not initially intervene upon a requirement of late intervention tied to a showing of good cause would place the FCA on constitutionally unsteady ground. Because we are to interpret statutes in a manner that renders them constitutionally valid, *Zadvydas*, 533 U.S. at 689, we should avoid an interpretation that unnecessarily binds the Government. Therefore, we conclude that the Government, in a case in which it has declined to intervene in the seal period, is not required to intervene with a showing of good cause under § 3730(c)(3) before moving to dismiss the action under § 3730(c)(2)(A). Nor do we engraft a good cause requirement on a government motion to dismiss.

C. Dismissal

We turn now to the correct standard of review of a government motion to dismiss a *qui tam* action under 31 U.S.C. § 3730(c)(2)(A). Although the Act itself is silent as to the standard of review of a motion to dismiss, the Senate Report incident to passage of this section explained its purpose:

> When the Government takes over a privately initiated action, the individual who brought the suit will be served, upon request, with copies of all pleadings filed as well as deposition transcripts. Additionally, the person who brought the action may formally object to any motions to dismiss or proposed settlements between the Government and the defendant.
>
> Any objections filed by the *qui tam* plaintiff may be accompanied by a petition for an evidentiary hearing on those objections. The Committee does not intend, however, that evidentiary hearings be granted as a matter of right. We recognize that an automatic right could provoke unnecessary litigation delays. Rather, evidentiary hearings should be granted when the *qui tam* relator shows a 'substantial and particularized need' for a hearing. Such a showing could be made if the relator presents a colorable claim that the settlement or dismissal is unreasonable in light of existing evidence, that the Government has not fully investigated the allegations, or that the Government's decision was based on arbitrary and improper considerations.

S. Rep. 99-345, at 26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291.[15]

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[15] In *Swift*, the D.C. Circuit discounted this language insofar as it might illuminate the standard of review of a government motion to dismiss a *qui tam* action in which it had not intervened because the language related to an earlier version of § 3730(c)(2)(A) that was not enacted. 318 F.3d at 253. The earlier version permitted a relator to object to government dismissal only in cases in which the Government had intervened. *Id.* Notwithstanding this distinction, we consider the language of the Senate report instructive on the

In *Swift*, the D.C. Circuit considered the standard to apply to a government motion to dismiss a *qui tam* action where the Government has not previously intervened and the defendant has not yet been served. 318 F.3d at 251. In its view, the Government's decision to dismiss is nearly unreviewable. [16] Section 3730(c)(2)(A)'s "opportunity for a hearing" language is simply intended to provide a forum for the relator to try to convince the Government not to dismiss the case. *Id.* at 253. The court reserved deciding the correct standard to apply in instances where the defendant was already served. *Id.* at 252-53. Because the case we review is one in which the defendants were served, and because under these circumstances we construe the hearing language of § 3730(c)(2)(A) to impart more substantive rights for a relator, we look to the Ninth Circuit for guidance.

The Ninth Circuit took up the standard of review of a government motion to dismiss a *qui tam* action in *Sequoia v. Baird-Neece,* 151 F.3d 1139. In that case, relators filed thirty-four *qui tam* actions against entities involved in the citrus industry, alleging violations of citrus fruit marketing orders promulgated by the Secretary of Agriculture. *Id.* at 1141. The Government elected to intervene in only ten of these actions. *Id.* at 1142. Five years after the initial filing of the *qui tam* actions, the Government moved to intervene in the remaining cases under § 3730(c)(3), upon showing good cause. *Id.* The Government declared it would litigate the *qui tam* actions if settlement could not be reached. *Id.* A year

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standard of review of a government motion to dismiss a *qui tam* action whether or not the Government has previously intervened.

[16] The *Swift* court indicated there might be exceptions to unfettered government discretion to dismiss a *qui tam* action as, for example, where fraud on the court is alleged. 318 F.3d at 253.

later, the Government announced its intent to withdraw from the *qui tam* cases. *Id.* Later still, the Government moved to dismiss the cases under § 3730(c)(2)(A), over relators' objections. *Id.* For purposes of the motion to dismiss, the Government, as in this case, conceded the relators' claims were meritorious. *Id.* at 1143.

The Ninth Circuit established the following standard for testing whether dismissal by the Government is appropriate: "(1) identification of a valid government purpose; and (2) a rational relation between dismissal and accomplishment of the purpose." *Id.* at 1145 (quotation marks omitted). If the Government satisfies this two-step test, "the burden switches to the relator to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal." *Id.* (quotation marks omitted). The district court here applied this standard, and we adopt it. In our view, it recognizes the constitutional prerogative of the Government under the Take Care Clause, comports with legislative history, and protects the rights of relators to judicial review of a government motion to dismiss.[17]

We next examine whether the district court erred in finding the Government met the standard set in *Sequoia v. Baird-Neece*, and in dismissing with prejudice the Relators' action. After an exhaustive review of the record, we conclude the court did not abuse its discretion in dismissing the *qui tam* action.

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[17] We do not decide at this time whether § 3730(c)(2)(A) gives the judiciary the right to pass judgment on the Government's decision to dismiss an action where the defendant has not been served and where the Government did not intervene in the action, facts of the sort presented in Swift.

1. Rational Relation to Valid Government Purpose

The Government argues that protecting classified information from disclosure and the timely closing of the contaminated Rocky Flats facility[18] are valid governmental purposes supporting its motion to dismiss the *qui tam* action. Relators agree. Where the parties part company, however, is on the question of whether dismissal of the action bears a rational relation to the stated objectives. Based on evidence adduced at the five-day evidentiary hearing, the district court, adopting the recommendation of the magistrate, concluded that it does. We concur.

The Government demonstrated that classified documents required in the litigation[19] would present a risk of inadvertent disclosure, implicating national security. The degree to which classified documents could be declassified or redacted was unknown. However, anyone handling classified information would need a security clearance. The magistrate judge found that the risk of inadvertent disclosure of classified information was greatest where much classified information was involved in the litigation; the risk lessened where classified information could be declassified or redacted. In the court's view, the risk

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[18] Rocky Flats houses radiological and chemical contaminants that pose a risk to public safety and the environment. It is scheduled to close in December 2006, and clean-up is currently in progress. A closure delay would cost approximately one million dollars a day and expose area residents to continued health and environmental risks. In excess of two and a half million people live within a fifty-mile radius of Rocky Flats.

[19] The Government estimates litigation would require review of thousands of classified documents; Relators claim this estimate is highly exaggerated.

of inadvertent disclosure, even if theoretically minimal, as the Relators argued, was sufficient to justify dismissal of the action. As the *Sequoia* test instructs, to establish a rational relation to a valid governmental purpose, "there need not be a tight fitting relationship between the two; it is enough that there are plausible, or arguable, reasons supporting the agency decision." *United States ex. rel. Sequoia Orange Co. v. Sunland Packing House Co.*, 912 F. Supp. 1325, 1341 (E.D. Ca. 1995) (quotation marks omitted). The Government met the test here.

The Government also demonstrated the litigation would delay the clean-up and closure of Rocky Flats by diverting the focus of security planners and management from the clean-up effort, by requiring the reassignment of personnel from the project to a review of classified documents for declassification or redaction in aid of litigation, and by placing an added financial burden on the project through a requirement to shift funds from clean-up to litigation. The Relators argued that many of their claims could have been determined without a significant diversion of resources by the Government. The magistrate concluded that while the evidence of diversion of resources from the clean-up effort to litigation was not "concrete" (Appellants' Br., Tab I at 21), it sufficiently established the likelihood of some diversion of resources, and "any diversion of personnel attention away from the closure project would negatively impact the closure schedule."[20] (*Id.* at 22) Once again, the Government satisfied the *Sequoia* test

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[20] The district court took into account a rational cost/benefit analysis conducted by the Government establishing that the benefits that might be obtained by successful prosecution of the *qui tam* action were outweighed by the risk the litigation would divert resources from the clean-up effort and delay closure of Rocky Flats.

by advancing a "plausible, or arguable" reason for the dismissal. *Id.*

2. Arbitrary and Capricious

Once the Government meets its burden of establishing a rational relationship between dismissal of a *qui tam* action and a valid government purpose, the "burden switches to the relator to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal." *Sequoia v. Baird-Neece*, 151 F.3d at 1145 (quotation marks omitted). Relators' principal argument is that the Government's motion to dismiss was fraudulent because it was motivated by a desire to spare DOE embarrassment over security lapses at Rocky Flats. [21] They contend a revolving door of employment between the DOE and its contractors at Rocky Flats fostered a climate of cover-up of security violations at the facility, including misuse of classification of documents in aid of the cover-up, and inspired both the DOE and its contractors to prevail upon the Department of Justice to dismiss the *qui tam* action. The district court found that while there was evidence of innocent cross-employment between the DOE and its contractors, there was no evidence that either the DOE or any of its contractors prevailed upon the Department of Justice to dismiss the action for improper purposes. In fact, there was no evidence the Department of Justice exercised anything other than its

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[21] Relators offered additional evidence of an arbitrary and capricious decision to dismiss: the Government waited until eight months after the seal period to move to dismiss, even though the reasons it offered for dismissal were known to it when the complaint was filed; and the Government did not dismiss a similar case. The district court concluded these allegations, while true, did not, without more, demonstrate the decision to dismiss was arbitrary and capricious.

independent judgment in deciding to dismiss the case. While the evidence suggested vigorous disagreement over security at Rocky Flats, the court declined to construe this as evidence that the Government's decision to dismiss was in aid of a cover-up. In fact, as the court noted, the alleged security deficiencies were reported to the Secretary of Energy, Congress and the press, and led to an investigation by the DOE Inspector General. In all of this heat, the district court found no light. Neither do we. The district court correctly concluded the Relators failed to meet their burden to show the Government's motion to dismiss was fraudulent, arbitrary and capricious, or illegal.

II. Discovery and Other Rulings in Limine

In preparation for the hearing on the Government's motion to dismiss, the magistrate stayed discovery. The district court approved the stay. We review discovery rulings for an abuse of discretion. *Motley v. Marathon Oil Co.*, 71 F.3d 1547, 1550 (10th Cir. 1995), *cert. denied,* 517 U.S. 1190, 134 L. Ed. 2d 781, 116 S. Ct. 1678 (1996). The discovery Relators wanted to conduct would have involved classified documents. Thus, discovery would have allowed what the Government was trying to avoid in moving to dismiss the action: divulging classified information. Furthermore, the Relators sought through discovery to challenge the Government's motivation behind the dismissal.[22] The magistrate denied the requested

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[22] Relators sought to depose "the Government personnel whose affidavits were attached in support of the United States Motion to Dismiss, Government personnel with primary involvement in the United States decision to decline intervention, and Government personnel with primary involvement in the United States decision to file the Government's motion to dismiss." (Appellants' App., Vol. III at 779.)

discovery on the grounds it would reach classified information and was irrelevant to the question of whether the proposed dismissal was rationally related to a valid governmental purpose. The court limited Relators' proof to their own witnesses and documents and cross-examination of government witnesses.

We expect the district court to exercise its discretion in determining when and how to limit discovery. Clearly, the district court did not abuse its discretion in this case in limiting discovery so as to avoid revelation of classified information, particularly when this was one of the very purposes behind the Government's motion to dismiss. Neither, for the reasons we next discuss in relation to the deliberative process privilege, did it err in denying inquiry into the Government's subjective motivation behind its dismissal.

Ruling in limine, the magistrate quashed the Relators' subpoena of the Government's person most knowledgeable about its motion to dismiss.[23] Furthermore, she indicated she would apply the deliberative process privilege at the hearing to any communications between government agents that were pre-decisional or deliberative relative to the motion to dismiss. Relators object to both rulings as a bar to what they claim is a legitimate inquiry into the subjective motivation of the Government in filing its motion to dismiss. We review a decision to quash a subpoena and evidentiary rulings of the trial court for abuse of discretion. *Heat & Control, Inc. v. Hester Indus., Inc.*, 785 F.2d 1017, 1022 (Fed. Cir. 1986)

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[23] Relators issued a subpoena under Fed. R. Civ. P. 30(b)(6) for the testimony of the "person most knowledgeable" about the Government's motion to dismiss.

(quash subpoena); *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419, 1433 (10th Cir. 1993) (evidentiary ruling).

The magistrate was correct to quash the subpoena for the Government's person most knowledgeable about its motion to dismiss for the plain reason that Fed. R. Civ. P. 30(b)(6), the provision under which the subpoena issued, authorizes a subpoena for deposition, and not in-court testimony. As to the deliberative process privilege, it

> "rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government."

Casad v. U.S. Dep't of Health & Human Servs., 301 F.3d 1247, 1251 (10th Cir. 2002) (quoting *U.S. Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9, 149 L. Ed. 2d 87, 121 S. Ct. 1060 (2001) (quotations and citations omitted)). Relators argue the Government should not be allowed the protection of the deliberative process privilege because they seek to establish the Government's motivation, for which the privilege is unavailable. They rely on *In re: Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 332 U.S. App. D.C. 251, 156 F.3d 1279 (D.C. Cir. 1998). The unavailability of the privilege in that case, however, did not extend to inquiries into the Government's subjective motivation for a decision. *Id.* at 1280. "When a party challenges agency action as arbitrary and capricious the reasonableness of the agency's action is judged in accordance with its stated reasons. Agency deliberations not part of the record are deemed

immaterial." *Id.* at 1279 (citation omitted). Therefore, the district court was correct to apply the deliberative process privilege.

III. Stipulation of Facts

Prior to the evidentiary hearing on the motion to dismiss, the Government agreed to stipulate, for purposes of the hearing, that Relators' claims of security deficiencies at Rocky Flats had merit. Relators quibble that the district court erred in allowing the Government to present evidence refuting certain of the Relators' factual allegations. We review the lower court's decision to admit, exclude, limit or refuse to limit the scope of the evidence for abuse of discretion. *McCue v. State of Kansas, Dept. of Human Res.*, 165 F.3d 784, 788 (10th Cir. 1999).

Relators list only two examples of statements they believe challenged the merits of their claims. In one, a Government witness expressed doubts the Relators would win anything in the lawsuit. He felt the nuclear material at Rocky Flats was secure. He believed the potential benefits of prosecuting the lawsuit were outweighed by the benefits of timely closure of the facility. In the same vein, the Government argued in closing that it preferred timely closure to the uncertain benefits at the end of a lawsuit. We first note that a stipulation to the merit of a claim does not translate into automatic recovery on the claim. Therefore, it was fair for the Government to weigh potential benefits from the lawsuit against the perceived benefits of terminating the action immediately. Next, Relators do not explain, nor can we understand, how the Government statements they cite negate the stipulation that there were security deficiencies at Rocky Flats. Finally, Relators provide no authority to support their contention that when parties stipulate that one side's claim has

merit for purposes of streamlining a hearing, the opposing party is prevented from presenting evidence pertaining to the very questions for which the hearing is being conducted. Because Relators failed to cite to legal authority regarding this argument, and because we find this argument completely lacks merit, it fails. *F.D.I.C. v. Schuchmann*, 235 F.3d 1217, 1230 (10th Cir. 2000).

CONCLUSION

We hold the FCA does not require the Government to intervene prior to moving to dismiss a *qui tam* action, we adopt the *Sequoia* standard for reviewing the Government's motion to dismiss, and we find it has met its burden under *Sequoia v. Baird-Neece*. We also hold the district court did not abuse its discretion in its rulings in discovery or in limine. We **AFFIRM** the decision of the district court.

DISSENT

EAGAN, J., dissenting in part and concurring in part and in the result.

I dissent only on the basis of the majority's determination that the FCA does not require the Government to intervene prior to moving to dismiss a *qui tam* action. In my view, where the Government has declined to intervene during the sixty-day seal period, it is required to intervene upon a showing of good cause under 31 U.S.C. § 3730(c)(3) before moving to dismiss the action. I believe a plain reading of the statute requires it, canons of statutory construction support such a result, and such a reading does not render the FCA unconstitutionally infirm.

The majority's focus on the provision of the statute which permits the Government to dismiss a *qui tam* action, 31 U.S.C. § 3730(c)(2)(A), disregards the surrounding provisions and the context in which the dismissal provision appears. Subsection (c)(2) relates to (c)(1), which provides:

> If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action **subject to the limitations set forth in paragraph (2).**

31 U.S.C. § 3730(c)(1)(emphasis added). Thus, subsection (c)(2) contains limitations applicable only to subsection (c)(1), the provision relating to the Government's election to proceed with the action. By their terms, subsections (c)(1) and (c)(2) do not apply where the government elects not to proceed during the seal period. Subsection (c)(3), however, relates to the Government's election not to proceed, as here. It provides, in relevant part:

> If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. . . . When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

Id., § 3730(c)(3). This is the subsection which provides for late intervention by the Government after an initial determination not to proceed.

In effect, the majority's reading of the statute eviscerates the provision addressing late intervention. Familiar canons of statutory construction direct the court to avoid such an interpretation. *E.g.*, *Oxy USA, Inc. v. Babbitt*, 268 F.3d 1001, 1006 (10th Cir. 2001) ("We must avoid, whenever possible, a statutory interpretation that would 'render superfluous other provisions in the same enactment.'" (quoting *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 877, 115 L. Ed. 2d 764, 111 S. Ct. 2631 (1991)); *New Mexico Cattle Growers Ass'n v. United States Fish and Wildlife Serv.*, 248 F.3d 1277, 1285 (10th Cir. 2001) ("We will not construe a statute in a way that renders words or phrases meaningless, redundant, or superfluous." (quoting *Bridger Coal Co./Pac. Minerals, Inc. v. Director, Office of Workers' Compensation Programs*, 927 F.2d 1150, 1153 (10th Cir. 1991)). Congress clearly intended to provide for late intervention by the Government.

Further, this court has long acknowledged: "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *In re Wise*, 346 F.3d 1239, 1241 (10th Cir. 2003) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 136 L. Ed. 2d 808, 117 S. Ct. 843, (1997)); *see Ferroni v. Teamsters, Chauffeurs & Warehousemen Local No. 222*, 297 F.3d 1146, 1151 (10th Cir. 2002) (citations omitted) ("To determine the plain meaning of the statute, we must consider the statute as a whole."); *Wyoming v. United States*, 279 F.3d 1214, 1230 (10th Cir. 2002) (To construe legislation, the court examines "the purpose, structure, and legislative history of the entire statute." (quoting *California v. Federal Energy Regulatory Comm'n*, 495 U.S. 490, 504, 109 L. Ed. 2d 474, 110 S. Ct. 2024 (1990)); *In re Overland Park Financial Corp.*, 236 F.3d 1246, 1252 (10th Cir. 2001) ("When

interpreting statutory language, this court 'must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.'") (citation omitted.); *United States v. Nichols*, 184 F.3d 1169, 1171 (10th Cir. 1999) ("When interpreting statutory language, however, appellate courts must examine the ... language in context, not in isolation."). Here, the context, design, and structure of the statute as a whole indicate that the government has unfettered discretion to dismiss if it intervenes within the sixty-day seal period, but not after.

The legislative history cited by the majority speaks to the circumstances of this case: "In those situations where new and significant evidence is found and the Government can show 'good cause' for intervening, paragraph (2) provides that the court may allow the Government to take over the suit." S. Rep. 99-345, at 26-27 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5292. This legislative history relates to the section of the amendment which became subsection (c)(3) of the statute. The legislative history is clear that late intervention requires good cause and even suggests that it requires new and significant evidence. Contrary to the conclusion of the majority, taking over the suit does not mean that intervention under subsection (c)(3) is permitted only if the government plans to proceed. Such is too expansive a reading of the legislative history. It does mean taking control of the action --which inherently includes the ability to seek dismissal.

Examination of the statutory language in context and in light of the legislative history does not place the FCA on unsteady constitutional ground. The Take Care Clause of the United States Constitution entrusts the Executive Branch with the duty to "take Care that the Laws be faithfully executed . . . ." U.S. Const. art. II, § 3. The FCA vests in the Executive

Branch sufficient control over *qui tam* actions; I do not read it to vest the Executive Branch with absolute control where the Executive Branch effectively abdicates its duty to control the litigation by failing to intervene initially within the seal period or to show good cause for late intervention. The Government is not bound unnecessarily by a requirement to intervene with a showing of good cause before moving to dismiss a *qui tam* action.

To the extent the Government's motion to dismiss can be construed as an implied motion to intervene, the issue becomes, then, whether the Government showed good cause for intervention. The district court found that mere intent of the Government to dismiss the case constitutes good cause. Such finding effectively eliminates the need to intervene at all, a finding which, again, renders the FCA's late intervention provision superfluous. I therefore disagree with the district court as to what constitutes good cause. In my view, the Government did show good cause by demonstrating that the lawsuit would compromise national security interests and delay the cleanup and closure of Rocky Flats.

I recognize that there is persuasive authority from other jurisdictions to support the majority's conclusion as to intervention, but I believe that those courts have engaged in iconoclastic statutory construction to reach that conclusion. As the majority acknowledges, the decision in *Swift v. United States*, 355 U.S. App. D.C. 59, 318 F.3d 250, 251 (D.C. Cir.), *cert. denied*, 539 U.S. 944, 156 L. Ed. 2d 630, 123 S. Ct. 2622 (2003), concerned a government motion to dismiss during the seal period, and the language in other cases occurs in *dicta*, *Kelly*, 9 F.3d at 753 n.10; *United States ex rel. Friedman v. Rite Aid Corp.*, 152 F. Supp. 2d 766, 772 (E.D. Pa. 2001); *Juliano v. Fed. Asset Disposition Ass'n*, 736 F. Supp. 348, 351 (D.D.C. 1990), or simply ignores the

language in 31 U.S.C. § 3730(c)(3) that the court may permit late intervention "without limiting the status and rights of the person initiating the action." *See Sequoia*, 151 F.3d at 1145 (9th Cir. 1998). The *Juliano* court recognized that subsection (c)(2)(A), "by its placement in the statute, appears to pertain to actions in which the government has already intervened," but reasoned that the "distinction is not crucial." 736 F. Supp. at 351. In my opinion, the distinction is crucial. If Congress intended the construction placed upon the statute by these courts, it would have chosen an alternative placement or omitted the limitations present in the statutory language.

The majority declined to "engraft a good cause requirement on a government motion to dismiss." Maj. Op. 17. I believe that its holding as to intervention essentially engrafts the *Sequoia* standard on a government motion to intervene after the seal period, and that such action contravenes the express language of the statute, as well as Congressional intent. For these reasons, I respectfully dissent. However, I concur in the result because, here, the Government has shown good cause to intervene under 31 U.S.C. § 3730(c)(3), as the district court found, and the reasons for intervention support dismissal under any standard.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 97-WM-2191

[September 27, 2001, Decided]

UNITED STATES OF AMERICA, ex rel., DAVID RIDENOUR, et al., Plaintiffs,	)
v.	)
KAISER-HILL COMPANY, L.L.C., et al., Defendants.	)

ORDER ON RECOMMENDATION OF MAGISTRATE JUDGE

Miller, J.

This matter is before me on the recommendation of Magistrate Judge Patricia A. Coan, issued August 7, 2001, that the United States's motion to dismiss be granted, that claims one and two of the second amended complaint be dismissed with prejudice, and that defendants be directed to

file an answer or other response to claim three of the second amended complaint within twenty days of this order. Relators filed a timely objection to the recommendation. 28 U.S.C. § 636(b).

I have reviewed *de novo* the pertinent portions of the record in this case, including the government's motion, the parties' briefs thereon, the recommendation, relators' objections, and the government's responses to those objections.[1] I have not read a transcript of the evidentiary hearing held by Magistrate Judge Coan, because relators failed to provide such a transcript. Fed. R. Civ. P. 72(b). I have, however, considered the parties' descriptions of the testimony and evidence presented at the hearing. Based upon this review, I conclude the recommendation should be accepted.

In my January 17, 2001 order, I agreed with Magistrate Judge Coan, over relators' objection, that the standard for dismissal by the government of this *qui tam* action is whether that dismissal is rationally related to a legitimate government purpose. *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998), *cert. denied*, 525 U.S. 1067, 142 L. Ed. 2d 657, 119 S. Ct. 794, 1999 U.S. LEXIS 105 (1999). The recommendation properly follows the two-step analysis of the *Sequoia* case, addressing first whether the government identified a legitimate governmental purpose and second whether it demonstrated a

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[1] Defendants also filed responses to the relators' objections. Because relators have objected to defendants' involvement in the evidentiary hearing held by Magistrate Judge Coan and because defendants' responses are not necessary to the resolution of the issues presented in the recommendation, I have not considered those responses here.

rational relationship between dismissal and the accomplishment of that purpose. After concluding the government had met its burden (that dismissal was rationally related to protection of national security interests and also to protection against delay in the closing of the Rocky Flats Environmental Technology Site (Rocky Flats)), Magistrate Judge Coan considered whether the relators had carried their burden of showing that the dismissal was fraudulent, arbitrary and capricious, or illegal. 151 F.3d at 1145.

Relators concede two parts of the government's case: that the protection of national security is a legitimate governmental interest, and that (in the abstract) the timely closure of Rocky Flats is a legitimate governmental interest. They contend, however, that the government failed to prove dismissal of the complaint is rationally related to these interests. Further, they argue the recommendation improperly shifted the burden to them to prove their case without using classified material and to prove they could prevail without delaying the scheduled closure of Rocky Flats. They point to alleged weaknesses in Magistrate Judge Coan's conclusions as evidence that the government did not prove its case.[2]

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[2] For instance, on the issue of whether the use of classified documents in this case would present national security risks, relators claim the government did not prove whether the relevant documents could be declassified or redacted or whether the risk of inadvertent disclosure of classified documents (if not declassified or redacted) would be significant. On the issue of the timely closure of Rocky Flats, relators contend the government failed to show, with credible evidence, that the alleged diversion of security and management personnel would actually occur or, if it did occur, would actually cause delay.

Relators incorrectly interpret the rational relation standard of review. "The government's power to dismiss or settle [a *qui tam*] action is broad." *Sequoia*, 151 F.3d at 1144. The *Sequoia* standard merely requires that the government justify its motion to dismiss by identifying a valid government purpose and showing a rational relation between dismissal and that purpose. *Id.* at 1145. There is no requirement that the government prove conclusively that, absent dismissal, the identified government interests will be adversely affected. *See id.* at 1146-47 (evidence that problems with lemon marketing were "*potentially* as pervasive" as those in orange industry was sufficient to extend dismissal to lemon industry action) (emphasis added).

The *Sequoia* standard is similar to the rational basis review of administrative action or statutory classification. *See, e.g., Romer v. Evans*, 517 U.S. 620, 116 S. Ct. 1620, 1627, 134 L. Ed. 2d 855 (1996) ("if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end"). In the context of review of county-imposed limitations on land use, the Tenth Circuit has held that a constitutional challenge to such limitations can prevail "only if the *alleged* purpose behind the state action has no *conceivable* rational relationship to the [state's asserted interest or power]." *Crider v. Board of County Comm'rs of Boulder County*, 246 F.3d 1285, 1289 (10th Cir. 2001) (emphasis added), *petition for cert. filed* (July 17, 2001). The actual purpose of the state action at the time of the action is irrelevant for rational basis analysis. *Id.* at 1289-90. *See also Federal Communications Comm'n v. Beach Communications, Inc.*, 508 U.S. 307, 113 S. Ct. 2096, 2101, 124 L. Ed. 2d 211 (1993) (statutory classification that does not infringe fundamental constitutional rights or follow suspect lines survives equal protection challenge "if there is any reasonably

conceivable state of facts that could provide a rational basis for the classification").

As these cases demonstrate, the government here met its burden under the rational relationship standard when it identified legitimate government interests and showed that there was a rational (even if not certain) relationship between accomplishment of those purposes and dismissal. Accordingly, relators' objections on this issue are overruled.

Relators also argue Magistrate Judge Coan erroneously found they had not met their burden of proof that the government's motion to dismiss was fraudulent, arbitrary and capricious, or illegal. *Sequoia*, 151 F.3d at 1145. I agree with the recommendation on this issue. Relators failed to negate every conceivable basis that could support the government's decision to dismiss, *Beach Communications*, 113 S. Ct. at 2101, or to show that fraudulent or illegal purposes were the true motivations behind that decision.

Relators' remaining objections are without merit.

Accordingly, it is ordered:

1. The recommendation issued by Magistrate Judge Coan on August 7, 2001, is accepted.

2. The motion to dismiss filed by the United States on August 21, 2000, is granted.

3. Claims one and two of the second amended complaint (alleging violations of 31 U.S.C. § 3729(a)(1), (a)(2), and (a)(3)) are dismissed with prejudice.

4. Defendants shall file an answer or other response to claim three of the second amended complaint (alleging constructive discharge) within twenty days of this order.
DATED at Denver, Colorado, this 27 day of September, 2001.

BY THE COURT:

Walker D. Miller

United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 97-WM-2191

[August 7, 2001]

UNITED STATES OF AMERICA, ex rel., DAVID RIDENOUR, et al., Plaintiffs,	)
v.	)
KAISER-HILL COMPANY, L.L.C., et al., Defendants.	)

OPINION

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Patricia A. Coan, United States Magistrate Judge

This is a qui tam action under the False Claims Act. The matter before the court is the United States' Motion to Dismiss [filed August 21, 2000]. An Order of Reference under 28 U.S.C. § 636(b)(1)(A) and (B) referred this case to

the undersigned magistrate judge on April 6, 2000 to issue recommendations on dispositive motions.

I.

The False Claims Act ("FCA" or "Act"), 31 U.S.C. § 3729 and § 3730, as amended by the False Claims Amendments Act, Pub.L. 99-562, 100 Stat. 3153 (1986), empowers the United States ("Government") or a private person to bring a civil action against a person or company who knowingly presents a false claim to the Government for payment, in violation of 31 U.S.C. § 3729(a). 31 U.S.C. § 3730(a) and (b)(1). The private citizen who brings an action under § 3730(b)(1), the "relator," sues on behalf of himself and the United States in what is known as a qui tam action. [1] The Act authorizes the Government to recover treble damages plus a statutory penalty of $5,000 to $10,000 for each false claim. 31 U.S.C. § 3729(a). The relator is entitled to receive up to thirty percent of the proceeds realized from the action or settlement, depending on the relator's role in prosecuting the litigation, plus his attorney's fees and costs. 31 U.S.C. § 3730(d).

The instant qui tam action is brought by relators David Ridenour, who was a director of safeguards and security at Rocky Flats in 1997, Jeffrey Peters, who was employed by defendant Wackenhut and held various management positions related to security at Rocky Flats from 1990 to 1996, and

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[1] The term "qui tam" is short for the Latin phrase "qui tam pro domino rege quam pro se ipso in hac parte sequitur," meaning "who pursues this action on our Lord the King's behalf as well as his own." *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 146 L. Ed. 2d 836, 120 S. Ct. 1858, 1860 n. 1 (citing 3 W. Blackstone, Commentaries *160).

Mark Graf, who was hired by defendant Wackenhut in 1990 and is currently a lieutenant in the protective force. The relators filed their original qui tam complaint under seal on October 8, 1997. The Government declined to intervene in the action on December 6, 1999, after conducting a two-year investigation into the allegations of the complaint. The complaint was unsealed on December 14, 1999.[2] The operative pleading is the Second Amended Complaint, filed on May 22, 2000. Defendants have not filed an Answer and the proceedings have been stayed pending determination of the United States' Motion to Dismiss.

The allegations of the Second Amended Complaint are summarized as follows: In 1995, the Department of Energy ("DOE") awarded Kaiser-Hill Co., LLC ("Kaiser-Hill") the contract for environmental clean up at the Rocky Flats Environmental Technology Site ("Rocky Flats"), a former nuclear weapons component manufacturing facility. Since 1995, Kaiser-Hill has subcontracted the portion of the contract involving security and protective force work to

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[2] The statute requires that a qui tam complaint be filed *in camera*, remain under seal for at least sixty days, and not be served on the defendant until the court so orders. 31 U.S.C. § 3730(b)(2). During the period in which the complaint is sealed, the relators must provide a copy of the complaint and written disclosure of all material evidence and information in their possession to the Government so that the Government may investigate the complaint's allegations. *Id.* Prior to the expiration of the sixty-day period or any extended deadline granted by the court, the Government may intervene and proceed with the action. *Id.*; § 3730(b)(3). If the Government elects not to intervene, the relators who filed the action may proceed on their own. § 3730(c)(3). The court may permit the Government to intervene at a later time upon a showing of good cause. *Id.*

Wackenhut Services Co, LLC ("Wackenhut"). Between 1989 and 1995, defendant EG&G Rocky Flats, Inc. ("EG&G") was the prime contractor with DOE for management and operations at Rocky Flats and was responsible for security at the site. When EG&G served as primary contractor, Wackenhut contracted directly with the DOE to provide security services at Rocky Flats. Relators allege that the DOE has paid the defendants millions of dollars to provide security for the Special Nuclear Material[3] ("SNM") at the Rocky Flats site. Each of the defendant's cost plus award fee contracts with the DOE required compliance with all applicable DOE orders and regulations regarding nuclear safety. Relators assert that between January 1990 and May 2000, defendants billed and received payment for providing security for weapons grade SNM which was either not provided at all, was substandard or defective, or was provided in violation of applicable rules, regulations, or contractual provisions. Relators allege that during the entire period relevant to the Second Amended Complaint, SNM at Rocky Flats was at high risk.

The Second Amended Complaint asserts, *inter alia*, that defendants: violated 31 U.S.C. § 3729(a)(1) and (a)(2), in knowingly presenting to the United States Government false claims for payment or approval under contracts funded with Government monies, which resulted in payment by the United States for work that was not performed or not performed in the manner represented by defendants; and, conspired to defraud the United States by "getting a false or fraudulent claim allowed or paid," in violation of 31 U.S.C.

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[3] Special Nuclear Material includes plutonium, plutonium uranium combinations and enriched uranium. (Government's Ex. K, p. 7)

§ 3729(a)(3).[4] Relators seek to recover millions of

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[4] The second amended complaint contains what relators refer to as ten "discrete" claims: (1) between 1990 and 2000, the contractors made false claims for payment for protective force personnel training which was not completed or was not in compliance with DOE orders and regulations (Second Amended Complaint, PP29-41); (2) the 1994 and 1997 Site Safeguard and Security Plans ("SSSPs") were false documents because the contractors represented to the DOE a higher level of security and a lower level of risk than actually existed (*id.* at PP42-53); (3) the defendants falsely represented in the 1994 and 1997 SSSPs that the protective force was taking the requisite compensatory measure of verifying, on a daily basis, the attachment of a security seal to the metal grating installed at the mouth of each drainage culvert (*id.* at PP54-63); (4) the contractors purchased partially mobile, bullet proof wedges, known as hardened fighting positions, a necessary compensatory measure to reduce high risk, but falsely represented to the DOE in the 1994 and 1997 SSSPs, and up through October 1999, that the hardened fighting positions were installed and operational, and that the requisite training and performance testing had been completed (*id.* at PP64-72); (5) between 1990 and 2000, the contractors represented to the DOE that the stacker/retriever, an automated storage system for SNM, complied with DOE regulations for a SNM vault, but defendants failed to make necessary modifications, or implement compensatory measures specified in the 1994 and 1997 SSSPs, to meet physical security requirements and reduce high risk (*id.* at PP73-83); (6) in October 1995, Kaiser-Hill moved SNM from an authorized storage vault to a room that was not a vault or vault-type room, without taking requisite measures to determine what physical protection or comprehensive measures were required to ensure an acceptable level of risk, in violation of the 1994 SSSP and DOE orders; (7) in the Fall of 1995, the contractors removed the "400 area," a fenced Classified Security area which contained classified files and parts and therefore had strict access controls, from Wackenhut physical access control without complying with a DOE order governing

dollars in damages and civil penalties on behalf of the United States and themselves.

The United States moves to dismiss this action under 31 U.S.C. § 3730(c)(2)(A), which states, in pertinent part: "The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion." The asserted grounds for dismissal are that continuation of this litigation threatens the timely closure of Rocky Flats and national security interests.

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diminished security, but collected an award fee for the performance measure (*id.* at PP96-104); (8) in the 1997 SSSP, defendants falsely claimed that minimum upgrades to the alarm system were sufficient to meet DOE requirements regarding the protection of SNM, despite the fact that defendants had determined in 1992 and in 1996 that complete replacement of the alarm system was the only means of complying with DOE-mandated levels of security (*id.* at PP105-113); (9) between 1991 and 1997, the radio system installed by EG&G was never performance tested against adversary jamming by EG&G or Kaiser-Hill, in violation of a DOE order and applicable contract provisions, resulting in a high level of risk to overall security (*id.* at PP114-116); and (10) during the 1990's, the contractors failed to provide the level of security required by DOE orders and regulations, and by their contracts with DOE, resulting in a general failure of security at Rocky Flats and high risk to SNM, but represented that security was at an acceptable level in their claims for payment (*id.* at PP117-121).

The second amended complaint also asserts that relator Ridenour was constructively discharged by his employer, the DOE, on April 10, 1997, because of his whistle-blowing activities, in violation of 31 U.S.C. § 3730(h). That claim is not at issue in this Recommendation, however.

On January 17, 2001, the District Judge held that the False Claims Act empowered the Government to dismiss a meritorious qui tam action, even though the Government initially declined to participate in the action, and, that the Government had demonstrated good cause for late intervention. *See* January 17, 2001 Order on Magistrate Recommendation, adopting, with modification, the November 28, 2000 Recommendation of United States Magistrate Judge. The District Judge further determined that the standard set forth in *United States ex. rel. Sequoia Orange Co. v. Baird-Neece Packing Corporation ("Sequoia Orange")*, 151 F.3d 1139 (9th Cir. 1998), governed disposition of the Government's Motion to Dismiss. *Id.* Under *Sequoia Orange*, the Government must identify a valid governmental purpose and demonstrate that dismissal of the qui tam action is rationally related to accomplishment of that purpose. 151 F.3d at 1145. If the Government meets its burden, the burden then switches to the relators "to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal." *Id. (quoting United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 912 F. Supp. 1325, 1347 (E.D.Cal. 1995)). The District Judge referred the matter to the undersigned to conduct an evidentiary hearing to determine whether the Government has met its burden under *Sequoia Orange*, and if so, whether the relators have satisfied their evidentiary burden so that dismissal of their qui tam action is precluded. *See* January 17, 2001 Order on Magistrate Judge Recommendation.

The undersigned held an evidentiary hearing on July 9, 10, 11 and 12 and received closing arguments from the parties on July 13, 2001. At the beginning of the evidentiary hearing, the parties stipulated that the relators' claims were meritorious for purposes of resolving the United States' Motion to Dismiss. The parties further stipulated that classified

information would be excluded from the evidentiary hearing and also agreed to the presence of a classification officer, Janet Nesheim, who was given authority to prohibit a particular line of questioning or testimony based on her determination that classified information would be implicated.

II.

A. Has the Government Satisfied the Two-Part Test under *Sequoia Orange*?

Under the *Sequoia Orange* standard, the Executive Branch has broad discretion under the False Claims Act to dismiss a qui tam action, even if the action is meritorious, so long as the reasons for dismissal are rationally related to a legitimate Government interest. 151 F.3d at 1145. The court addresses the Government's articulated bases for dismissal in turn.

1. Threat to National Security Interests

The Government first asserts that dismissal is rationally related to the Government's legitimate interest in protecting national security because the large number of classified documents involved in this case creates an unacceptable risk of inadvertent disclosure.

The primary witnesses for the Government and the defendants on the issue were Barbara Stone, the Director of the DOE Office of Safeguards and Securities Evaluations, Rodney Hoffman, DOE field classification officer at Rocky Flats, Martin Anderson, Wackenhut manager of security planning and integration, and Steven Cunningham, Kaiser-Hill program manager and classification officer. The primary witnesses for the relators were Colonel Edward McCallum,

a former original classifier and declassifier for the DOE, and relator Mark Graf, a derivative classifier.

The parties agree that classified information will be involved in the litigation of this case, but disagree about the quantity of classified documents needed. Because discovery has been stayed, each party could offer only a preliminary lay opinion about the number of classified documents at issue. Relators' position is that their claims can be proven with limited reference to classified documents. Mark Graf testified that less than ten classified documents would be needed to establish one or more of the relators' claims, except for the "general failure of security" claim, which would involve approximately thirty classified documents. Witnesses for the Government and defendants opined that the defense of relators' allegations that security at Rocky Flats was at high risk for a decade would require the review of thousands of classified documents. Martin Anderson and Barbara Stone testified that numerous classified documents are potentially relevant to the security issues raised by the relators, including the 1994 and 1997 SSSPs, comment resolution documents, vulnerability assessments, modeling data, most physical security systems documents, and performance testing results.

It is unknown at this time whether classified documents relevant to this litigation could be declassified or meaningfully redacted. The evidence was that a classified document can be declassified if the declassifier determines that the vulnerability no longer exists at the Rocky Flats site, or at any other DOE site. (Stone, Hoffman, Cunningham and McCallum testimony) Redaction means that the classified information is removed from the document and the remainder of the document is unclassified and can be disclosed to persons who do not hold a security clearance. (Hoffman testimony)

Pursuant to Executive Order ("EO") 12958, promulgated April 17, 1995, documents at Rocky Flats which were classified after April 1995 are portion-marked, which means that classified areas of a document, and automatic declassification areas, are identified on a section-by-section basis.[5] (Hoffman testimony; Government Ex. G-2, § 1.7) Hoffman testified that, pursuant to the directives in E.O. 12958, if a document can be declassified or desensitized, [6] then it should be. Most of the documents relevant to this litigation concern safeguards and securities. (Hoffman testimony) Some of the safeguards and securities documents at Rocky Flats which are currently classified are marked to automatically declassify upon the occurrence of a date or event. (*Id.*) When the declassification event or date occurs, the document must be reviewed by the DOE or contractor classification office before it is released publicly. (Hoffman, Cunningham testimony) Only a minimal number of documents at Rocky Flats have been declassified. (Hoffman testimony)

In addition to declassification and redaction, DOE must take into account the effect of mosaic compilation, i.e., two or more pieces of unclassified information may become classified when they are associated. (Stone, Hoffman

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[5] E.O. 12958 prescribes a uniform system for classifying, safeguarding and declassifying national security information. (Government's Ex. G-2) Section 1.7 provides that at the time of original classification, the face of each classified document shall reflect, *inter alia*, the date or event for declassification, the date that is ten years from the date of original classification, or the exemption category from declassification. (*Id.*)

[6] "Sensitive information" is Unclassified Controlled Nuclear Information concerning nuclear material, weapons, and components that is restricted in use. (Government Ex. G-3, p. 4)

testimony) Non classified materials must be reviewed for potential mosaic compilation effect. (*Id.*) None of the witnesses testified that they have ever seen the effect of mosaic compilation.

The evidence was undisputed that any individual involved in this litigation would need a security clearance to handle or review classified material, including the attorneys and their staff, the judge and court staff, and the jurors; however, no security clearances are needed to review declassified or redacted material. Hoffman testified that in his prior experience with litigation involving Rocky Flats, neither the judge nor the jurors have ever needed a security clearance. There was no evidence that classified information has ever been disclosed during the course of litigation, save for a single instance of inadvertent disclosure by a DOE attorney.

Protection of the national security is undoubtedly a legitimate governmental interest. If classified documents relevant to this litigation cannot be declassified or redacted, then there is a risk of inadvertent disclosure of nuclear security information because everyone who reviews, handles, and discusses the classified information must possess a security clearance. If a number of people have security clearances, the risk of inadvertent disclosure is greater. The risk is lessened when the classified materials can be declassified or redacted because then presumably only the attorneys may need to review the classified versions of the documents. The evidence showed that in other qui tam cases involving classified information, the attorneys were issued security clearances to review the classified information and no inadvertent disclosures occurred. The classified information at issue in those cases was probably redacted or declassified at some point, however, because there was no need to issue security clearances to the judge or jurors. If the classified

material needed to prosecute and defend this action is not subject to declassification or redaction, the risk of an inadvertent disclosure by one of the numerous persons who will be required to hold a security clearance is not insignificant and dismissal of this action would clearly advance the Government's legitimate interest in protecting the national security. On the other hand, if the relevant classified information is subject to declassification or redaction, the relationship between dismissal of the action and elimination of a threat to national security interests is much weaker. As noted by the district court in *Sequoia Orange*, however, even when the legitimate interest articulated by the Government is only "incidentally advanced," the rational relationship test has been satisfied. *See* 912 F. Supp. at 1343. Thus, even if the risk of inadvertent disclosure of classified information in this litigation is minimal, the risk is still present. The court finds that the Government has satisfied its burden to show that dismissal of this action is rationally related to protection of national security interests.

2. Timely Closure of Rocky Flats

The Government contends that continuation of this qui tam litigation will delay the timely closure of Rocky Flats, scheduled for December 15, 2006, by interfering with the job performance of the DOE and contractor employees whose expertise is necessary to accomplish the closure and by diverting the limited funds appropriated for the closure project to litigation expenses. The Government emphasizes that the timely closure of Rocky Flats is of paramount public interest because the radiologically-contaminated Superfund site[7] poses

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[7] At the evidentiary hearing, the parties stipulated that the Environmental Protection Agency has designated Rocky Flats as a

a serious risk to human health and the environment and is costing taxpayers millions of dollars a year to maintain.

The parties stipulated at the evidentiary hearing that plutonium, acid, and chemical wastes present at the Rocky Flats site are a public health and safety risk. Two buildings at the Rocky Flats site, # 771 and # 776, were identified in a 1994 DOE Report as the most vulnerable facilities within the DOE complex. (Government's Ex. H, DOE Plutonium Working Group Report on Environmental, Safety and Heath Vulnerabilities, dated November 1994, p. vi[8]) Three other buildings at Rocky Flats, # 779, # 707, and # 371, were included within the top ten most vulnerable sites. (*Id.*) More than two and a half million people live within a fifty-mile radius of Rocky Flats. (Government's Ex. T, Rocky Flats Closure Project Management Plan, dated June 1998, p. 5) The court finds, and relators do not dispute, that the accelerated closure of Rocky Flats is a legitimate Governmental interest.

At issue is whether dismissal of this qui tam action will advance the Government's legitimate interest in the accelerated closure of Rocky Flats. The primary witnesses

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Superfund site under CERCLA, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601, *et seq.* The Superfund is the general federal fund for hazardous waste management under CERCLA. 42 U.S.C. § 9611.

[8] The DOE Plutonium Working Group Report defined vulnerabilities as "degradation in plutonium materials and packaging, and weaknesses in facilities and administrative controls that can result in inadvertent releases of plutonium that can expose workers and the public, or contaminate the environment." (Government's Ex. H, p. vi)

who testified in support of the Government's contention that this qui tam suit may interfere with the timely closure of Rocky Flats were James Owendoff, Principal Deputy Assistant Secretary for Environmental Management, at DOE headquarters in Washington, D.C. since 1995, Paul Golan, Deputy Manager of the Rocky Flats Field Office at Rocky Flats since November 1999, and James Steward, Director of Safeguards and Security at Rocky Flats since June 1997. The relators' primary witness to refute the Government's position was Mark Graf, an alarm station program manager for Wackenhut's protective force.

a. Proposed Factual Findings

In 1992, Rocky Flats' mission changed from the production of nuclear weapons components to environmental waste management and cleanup. (Golan, Owendoff testimony) When production was shut down, the nuclear components were in various forms of storage. (Owendoff testimony) The DOE was charged with stabilizing the plutonium and cleaning up the contamination. (*Id.*) Closure of Rocky Flats became a DOE priority because of the high levels of radioactive waste present at the site which are not in a condition which is safe for long-term storage. (*Id.*) The original closure deadline established by the DOE was 2060. (Golan testimony) In 1995, the DOE negotiated the first performance-based contract with Kaiser-Hill which projected a closure date of 2015. (*Id.*) The Rocky Flats Cleanup Agreement was signed by the DOE, Colorado Department of Public Health and the Environment and the EPA in 1996. (*Id.*; Government's Ex. K) In October 1997, then Secretary of Energy Frederico Pena designated Rocky Flats as a pilot site for clean up and projected closure within ten years. (Golan testimony; Government's Ex. M; February 2001 GAO Report, Relators' Ex. 39, p. 1)

Owendoff and Golan negotiated the DOE closure contract with Kaiser-Hill which was signed in January 2000. (Owendoff, Golan testimony) The DOE did not competitively bid the closure contract because of concerns that the time involved in the bidding process and in bringing a new contractor up to speed would delay the target closure date of December 15, 2006 by as much as one year. (Owendoff, Golan testimony; Government's Ex. L, July 29, 1999 Memo from Secretary of Energy Richardson) Further, the DOE was generally satisfied with Kaiser-Hill's performance. (*Id.*) The closure contract is a cost plus incentive fee contract. (Contract/Award, Government's Ex. J) The amount of the incentive fee Kaiser-Hill will receive ranges between $130 million and $ 460 million depending upon the costs incurred and whether Kaiser-Hill closes Rocky Flats before, on, or after, the target closure date of December 15, 2006. (*Id.*; Relators' Ex. 39, pp. 16-17) The closure contract is flat-funded through a separate Congressional appropriation of approximately $ 650 million per year which was established in fiscal year 1998. (Golan, Owendoff testimony) Congress authorized the special appropriation after determining that accelerated closure of Rocky Flats by 2006, is in the public's best interest. (*Id.*)

As set forth in the Rocky Flats Closure Project Management Plan, dated June 29, 1998, accelerated closure will: (1) eliminate a "major safety and environmental risk"; (2) eliminate the $ 400 million annual cost (approximately $1 million a day) of safeguarding nuclear material and maintaining a safe work environment at Rocky Flats; (3) contribute "important lessons learned" and establish "a blueprint to be followed for the difficult cleanup challenges faced by other sites in the DOE weapons complex"; and (4) demonstrate to Congress and the public that the DOE can "successfully meet the challenge of efficient and safe

environmental clean up." (Government's Ex. T, pp. 5-6; Owendoff, Steward and Golan testimony). The Government maintains that litigation of this action will negatively impact the projected closure date of December 15, 2006 by diverting the focus of security planners, including vulnerability analysts, and managers away from the closure project. The Government further maintains that the necessary review of classified documents for declassification or redaction will divert the attention of additional personnel and funds away from the closure project.

Paul Golan brought his concerns about the impact of this qui tam suit on the accelerated closure of Rocky Flats to DOE/Rocky Flats counsel and to the Department of Justice ("DOJ") because, in his opinion, the benefits the DOE will realize through accelerated closure of Rocky Flats, i.e. elimination of public safety risk and $1 million per day in maintenance fees, outweigh the benefits which could be realized from the successful prosecution of this action. (Golan testimony) If closure is not completed by the 2006 target date, Congressional funding may decrease significantly, daily maintenance costs will be extended, and other maintenance issues which currently are being ignored because of expedited closure would have to be addressed at the site. (Owendoff, Golan testimony) Other DOE sites have already suffered a reduction in funds due to Congressional cuts to the DOE budget this year. (*Id.*)

Evidence on each area of this lawsuit's possible impact on the target closure date was presented at the hearing as follows.

1. Diversion of security planners

The closure project contemplates 15,000 discrete activities which are represented in a critical path developed by Kaiser-Hill. (Golan testimony) The critical path is defined such that if the completion of one of those activities is delayed by one week, the closure of Rocky Flats is delayed by one week. (*Id.*) The major activities involved in the closure project include the continued stabilization, consolidation and protection of nuclear materials, the safe shipment of those materials to designated sites around the country, and the decommission and demolition of the contaminated buildings that formerly contained the nuclear materials. (Owendoff, Golan testimony) At this time, the DOE is reducing the size of the protected area, the area where SNM is stored, so that demolition workers who do not have security clearances will have extensive access to the buildings which formerly contained the Category 1 and 2 SNM, buildings # 771 and # 776. (Steward testimony) The Kaiser-Hill vulnerability analysts are installing a fence system in the new protective area surrounding building # 371, the building where all Category 1 and 2 SNM is currently stored. (Steward, Owendoff testimony)

Vulnerability analyses are important to the closure project to ensure the continued protection of SNM. (Steward testimony) A vulnerability analysis involves the identification of targets, i.e., SNM or classified material, analysis of what measures are in place to protect the targets, analysis of possible areas of vulnerability where the adversary could penetrate, and analysis of what protective force systems could effectively neutralize such a penetration. (Steward testimony) Several layers of protection are in place at Rocky Flats and thousands of variables affect each security layer. (*Id.*) Each variable identified by the vulnerability analysts is entered into

a computer program and the program calculates whether the overall security risk to the site is low, medium or high. (*Id.*) If the risk is high, the analyst team must then look at potential compensatory measures to reduce the particular risk and any physical changes are then entered into the computer program. (*Id.*) The new variable(s) may adversely affect a different security layer and the whole process will have to be repeated. (*Id.*)

There are limited key personnel at Rocky Flats who understand the challenges involved in stabilizing nuclear materials and safely shipping them. (Steward, Golan testimony) Because DOE has never closed a nuclear weapons plant before, and due to the aggressive closure schedule, security planners are engaged in first-time, complex problem solving functions and must focus all of their attention on the clean up project. (Golan, Steward testimony) Martin Anderson, Wackenhut manager of security planning and integration, testified that security planning is critical to the closure project because if safety or security is found deficient in any area, the entire closure project comes to a halt until the deficiency is removed. (Anderson testimony) Mark Hubbell, a security planner for Wackenhut since 1995, testified that as Rocky Flats works toward closure, the security planners have more duties than before because the relocation of all Category 1 and 2 SNM into Building # 371 requires them to reconfigure the entire security system. Further, a vulnerability analysis will be required any time "hold up"[9] is discovered in

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[9] "Holdup" is a term used to describe solidified and liquid plutonium deposits which have accumulated in facilities and equipment over the years. (Steward testimony; Government's Ex. H, p. 16) Holdup is commonly found in gloveboxes, ventilation ducts, and low spots in process piping, tanks and drains. (*Id.*)

the former production buildings because this material is outside the protected area. (Steward testimony)

There are two Rocky Flats DOE staff members and approximately ten to twelve contractor employees who perform vulnerability analyses at Rocky Flats. (*Id.*) A vulnerability analyst must have intimate knowledge of the site and of the security measures which are in place in order to develop a scenario to defeat an adversary and protect the target. (*Id.*) Although there are approximately twelve other persons located around the country who could be called in to perform the work, they would have to first familiarize themselves with the Rocky Flats site and that would cause additional delay. (*Id.*)

After reviewing the allegations of the second amended complaint, Golan, Owendoff and Steward concluded that security planners, including vulnerability analysts, who are essential to the closure process would have to be involved in defending the case because relators allege a general failure of security at Rocky Flats for a ten-year period. Stone and Steward testified that because security at Rocky Flats is integrated, one cannot determine whether the facility was at high risk by looking at a single variable; rather, it is necessary to look at all variables to determine what compensatory measures were in place which would have reduced the overall level of risk to the facility. To determine the level of risk present at any given time in the past, a vulnerability analyst would have to recreate the security specifics and validate the security measures in place at that time. (*Id.*)

Relators elicited testimony that several of the security planners whom Steward identified in his Declaration in support of the United States' Motion to Dismiss as critical

personnel for the closure process are no longer working at Rocky Flats: one security planner was laid off by the contractors, and others left to find more secure employment because once Rocky Flats is closed, there will be no more jobs at that site.[10] (Anderson, Steward, Hubbell testimony) Further, none of the witnesses for the Government or the defendants could attest that the contractors had designated the security planners as key personnel, or offered them retention packages to stay at Rocky Flats through completion of the closure project. Hubbell testified, however, that when security planners leave Rocky Flats, others have to assume their job responsibilities.

Relators also elicited the following testimony from Steward on cross examination. The vulnerability analysis in a SSSP may show that Rocky Flats is at high risk without implementation of a certain compensatory measure.[11] The DOE approves the SSSP if the contractor implements the specific compensatory measure needed to reduce high risk. If there is evidence that the specific compensatory measure was not implemented, then it would not be necessary to recreate

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[10] As Rocky Flats moves towards closure, contractor staff is being reduced as contractor functions are eliminated. (Golan testimony)

[11] The SSSP is a "snapshot" which represents the security configuration at each DOE site at a particular time. (Stone, Steward testimony) The SSSP is prepared by the contractors and includes a management report and a vulnerability analysis. (Steward testimony) The DOE validates and verifies the contents of the SSSP to ensure that it accurately reflects the status of nuclear security at the site. (Steward testimony) The SSSP is the master agreement between the contractor and the DOE. (Anderson testimony) Any exemption from DOE regulations or orders approved by the DOE should be contained in a SSSP. (*Id.*)

a vulnerability analysis to show whether or not the site was at high risk in the past without the compensatory measure because the vulnerability analysis in the SSSP already made that determination.

Relator Mark Graf opined that security planners would not have to be involved in the litigation of relators' claims, with the exception of the bulk incident claim and alarm system claim. Graf further opined that even though the second amended complaint alleges that the contractors placed security at high risk for one decade, the relators would not have to demonstrate that Rocky Flats was at high risk to prove any of their discrete claims, except for the general failure of security claim, because high risk is merely the impact of the allegedly false claims for payment.

2. Diversion of management

There was evidence that the participation of management in the litigation of this case could possibly impact the closure deadline. Golan testified that he spends approximately ten percent of his time in litigation matters and believes, based on his experience with other lawsuits, that discovery, redaction or declassification of classified materials, and meetings with attorneys will divert the contractor managers' focus away from closure. Martin Anderson testified that approximately one year ago, Wackenhut assigned him to gather documents to be disclosed to the relators as part of Wackenhut's initial disclosures because of his knowledge of the factual information relevant to the relators' allegations. Anderson worked full-time for approximately one month gathering relevant unclassified documents, which he estimated to be one-fifth of the unclassified documents which would need to

be reviewed.[12] While Anderson was engaged in document review, he was no longer involved in security planning and Wackenhut lost a week of security planning activity. (Anderson testimony) Anderson does not know if the entire closure project was delayed by one week because of his absence, but stated that most of Wackenhut's security planning activities are tied to the critical path.

Anderson opined that, based on his experience in the initial document gathering process, it would take him approximately one year to gather and review all documents which are potentially relevant to the defense of this action. If the discovery process were accelerated by assigning more persons to the task, those persons would not be working on the closure project. (Anderson testimony)

Golan also opined that this litigation will foster an adversarial relationship between DOE and its contractors which will negatively impact the collaborative process and will interfere with the DOE's ability to achieve the 2006 closure date.

3. Review of Classified Documents

There was some evidence that the review of classified documents for declassification or redaction will divert additional personnel away from the closure project. Rodney Hoffman testified that the forty-seven documents which relators requested in a March 2, 1998 letter from relators' counsel to the DOJ (Relators' Ex. 1) were classified. Hoffman

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[12] Anderson estimated that numerous classified documents are relevant to the security issues raised by the relators in the second amended complaint, but he did not review many of them because no procedures are in place for the production of classified material.

opined that it would take two people, one of whom must be a declassifier, one year to review the documents on the list for declassification and for the mosaic effect of any nonclassified information contained in the documents.[13] Hoffman estimated that it would take approximately 250 hours to redact the classified information from a SSSP. Relator Mark Graf, who is a derivative classifier of protective force operations documents (NSI materials), but is not an authorized declassifier, testified that it takes him an average of one to one and a half minutes to review one page of a document for classification purposes.

When Hoffman initially reviewed documents for declassification in the *Cook* case, he spent one day every other week on the project, but as the litigation progressed and plaintiff's counsel identified other relevant documents, the DOE was required to hire eighty persons to work full time on the project for one-year. (Hoffman testimony) DOE staff redacted more than one million pages of documents during that one-year period. (*Id.*)

Hoffman testified that to find declassifiers today would be difficult because many DOE declassifiers have lost their security clearances. There are currently eight declassifiers at

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[13] Hoffman testified in *Cook v. Rockwell Int'l Corp.*, that he could review forty pages of a classified document in six hours (Hoffman testimony); however, the classified information relevant to the security issues in the Cook case was restricted data as opposed to the national security information ("NSI") which forms the bulk of the classified information at issue in this case. (*Id.*) Witnesses for both parties agreed that it is more time-consuming to review an NSI document for declassification because restricted data is easier to identify than NSI data and the rules for declassification of NSI data are not as clear cut. (Hoffman, Graf testimony)

Rocky Flats who work for DOE or the contractors. (Hoffman testimony) According to Hoffman, review of classified documents relevant to this litigation for declassification would require the DOE to pull declassifiers from the contractor classifier program and most of them are involved in the Rocky Flats closure project.

4. Impact to closure budget

The evidence showed that monies for DOE litigation expenses must come from either the general DOE budget or the special Congressional appropriation for the Rocky Flats closure project. (Owendoff testimony) Hoffman testified that complying with discovery requests in the *Cook* litigation cost the DOE $7 or $8 million.

b. Analysis

The court finds that the Government has sufficiently demonstrated that dismissal of this case will eliminate a possible impediment to the timely closure of Rocky Flats. Admittedly, the evidence on this issue is not concrete because the defendant contractors have not answered the allegations of the second amended complaint and it is not clear which closure project personnel will be needed to participate in the discovery process and in meetings with defense attorneys to defend against the relators' claims; however, the court is persuaded that any diversion of personnel attention away from the closure project would negatively impact the closure schedule. Even if the case could be litigated without the necessity of vulnerability analyses to recreate past security specifics at Rocky Flats, it is a reasonable assumption that any safeguards and security staff who are currently involved in the closure project, and who have personal knowledge of the past events alleged in the second amended complaint, are potential

witnesses in this action and may be called upon to locate relevant documents. By the relators' own account, security planners are needed to prove their bulk incident and alarm system claims. Further, Golan's concerns that the defendant contractors and the DOE will be in an adversarial relationship if this lawsuit continues are not unfounded. Relators seek millions of dollars in damages from the contractors. If the contractors are required to defend litigation which could severely impact their financial viability, they will likely devote substantial attention to this lawsuit, possibly at the expense of the DOE's high-priority Rocky Flats closure project. Less persuasive was the Government's evidence that the litigation expenses incurred in this action would be paid with monies needed to effect the timely closure of Rocky Flats. The only evidence on the issue was that the DOE's involvement in this case would be funded from the DOE's general budget or from the special Congressional appropriation fund. The impact of this suit upon the closure project funds is unknown at this time; however, any funds diverted from the closure project to pay for litigation expenses could potentially have a negative impact on timely closure.

Relators take issue with the Government's failure to confer with them about whether any of the claims asserted in the second amended complaint can be litigated without negatively impacting the closure schedule prior to filing the dismissal motion. Relators contend that dismissal of the entire case is not rationally related to the timely closure of Rocky Flats because some of their claims, such as that relating to the implementation of hardened fighting positions, require them to prove only that DOE paid for security based on the implementation of a particular compensatory measure and that compensatory measure was not implemented by the contractors. Thus, relators argue, litigation of the hardened

fighting positions claim would not require vulnerability analysts to recreate past security at Rocky Flats. Relators further maintain that other claims, such as the failure to maintain the mandated training of the protective force, require them to prove only that the contractors failed to comply with certain DOE orders and regulations, but represented otherwise in claims for payment to DOE.

The difficulty with the relators' position is that it takes into account only those witnesses and documents which relators believe are necessary to their litigation strategy. It is not known at this time what evidence will be involved in defending the relators' claims; however, given the nature of the allegations of the Second Amended Complaint, it is probable that defendants will take a "kitchen sink" approach in their defense. The bulk of the second amended complaint alleges that compensatory measures required by the 1994 and 1997 SSSPs to reduce the security risk at Rocky Flats to an acceptable level were not implemented, but the defendants submitted claims for payment to the DOE after expressly or impliedly certifying that such compensatory measures were in place. The relators have alleged that each and every payment made to the contractors by the DOE for security and remediation at Rocky Flats in the 1990's was a false claim for payment because the DOE would not have paid the claims if the DOE had known that the facility was at high risk. It is possible that defendants will defend on the ground that even if a particular compensatory measure was not utilized, other compensatory measures were in place to reduce the level of risk at the site and those measures were acceptable to the DOE. Whether such a defense strategy would be successful is irrelevant, the critical point being that the evidence which defendants might amass to defend against relators' claims could very well be much broader than the evidence which relators believe is necessary to litigate this action.

Further, the two specific claims cited by relators as claims which can be isolated and litigated without impact to the closure project involve training of, and performance testing by, Wackenhut's protective force, areas which are under the direction of Martin Anderson. Anderson will likely be a key witness in the defense of those claims and his involvement in this litigation may result in a delay in the completion of one of the discrete activities of the critical path which will result in a possible delay of the Rocky Flats closure.

Relators also assert that their claims against EG&G, a former contractor, would not delay the closure of Rocky Flats because EG&G is no longer at the site; the evidence shows, however, that former EG&G employees went to work for Kaiser-Hill when EG&G's contract terminated. (Steward testimony) Although there was no evidence about the number of former EG&G employees who are currently involved in the closure project, Martin Anderson, Wackenhut's current manager of security planning and integration, worked for EG&G as a security system analyst in the early 1990's and provided input for the 1994 SSSP pertaining to performance testing and tactical planning. (Anderson testimony) Anderson is knowledgeable about the issues relevant to relators' claims against EG&G and would probably be involved in EG&G's defense of those claims which would divert his attention from the closure project.

The evidence supports the Government's position that any diversion of contractor or DOE personnel from the closure project to participate in discovery or other litigation defense presents a risk of delay to the closure deadline of December 2006. Even if Rocky Flats does not close on schedule because

of other influences unrelated to the instant litigation,[14] that fact does not preclude a finding that dismissal of this action will eliminate one potential cause of delay. The Government engaged in a rational cost/benefit analysis and determined that the potential benefits to be gained by allowing this litigation to go forward are outweighed by the potential risk that the prosecution and defense of this action will divert the attention of managers and other DOE and contractor employees away from the closure project with a resultant delay in closure. The relators have not demonstrated that any of their "discrete claims" can be litigated without adverse impact to the closure project. Because the court finds that the Government has met its burden to establish that dismissal of this action will advance legitimate governmental interests, the burden shifts to the relators to prove that the dismissal is fraudulent, arbitrary and capricious, illegal, or the product of undue influence by the defendants.[15]

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[14] A February 2001 General Administration Office ("GAO") Report to Congressional Committees on the progress of the cleanup at Rocky Flats concludes that closure by 2006 is unlikely because of various obstacles faced by the contractors. (Relators' Ex. 39, p. 2). The GAO Report does not mention this litigation as a possible reason for delay in closure.

[15] Relators also argue, in their Memorandum in Opposition to United States' Motion to Dismiss, that even if this litigation does impact the closure date, the cost of any delay should be born by the contractors, not the Government, because the contract provides incentives for closure prior to the target date of 2006 and penalties for delay. The relators' argument is directly refuted by the February 2001 GAO Report which projects that a two-year delay in closure would increase the overall cost of the project by approximately $630 million, requiring the DOE to pay $530 million, with the remainder being the amount of incentive fee Kaiser-Hill would forfeit due to the contractor's failure to meet the

B. Is the Motion to Dismiss illegal, fraudulent, arbitrary and capricious, or the product of improper influence by the defendants?

Relators advance several arguments in support of their position that the Government's motion to dismiss is arbitrary and capricious, is brought for a fraudulent purpose, or is the product of undue influence by the defendants.

Relators first argue that the motion to dismiss is arbitrary and capricious because the difficulties involving use of classified material, the closure deadline and the available funding were known to the Government when this suit was filed, but the United States did not intervene in, or move to dismiss the action at that time. Although no explanation was given at the hearing as to why the Government waited eight months after the complaint was unsealed to file the motion to dismiss, the fact that the reasons advanced in support of the dismissal motion were known to the Government during the sealed period does not, by itself, support a finding that the Government's action is arbitrary and capricious. Indeed, each of the alleged improper reasons for dismissal advanced by the relators was also known to the Government while the complaint was under seal.

Relators next argue that the Government's decision not to dismiss *Cook v. Rockwell Int'l Corp.*, Civil Action No.90-K-181, a pending action against EG&G's predecessor at Rocky Flats which involves a large number of classified documents,

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closure deadline. (Relators' Ex. 39, p. 19 and n. 22) Further, the evidence showed that any delay of the closure of Rocky Flats will extend the $ 1 million a day maintenance fees paid by the taxpayers and will prolong the public health and safety risk caused by the continued presence of the Superfund site.

demonstrates that the asserted reason for dismissal of the instant action is arbitrary and capricious. *See Cook v. Rockwell Int'l Corp.*, 935 F. Supp. 1452, 1458 (D.Colo. 1996). The court is not persuaded by this argument. The Government decides to dismiss qui tam actions on a case-by-case basis. Although a risk of inadvertent disclosure is present in every case involving classified material, the Government does not act arbitrarily by moving to dismiss one of those cases, but not others. The DOJ has made a rational and legitimate policy decision that litigation of the instant action presents an unacceptable risk of inadvertent disclosure of classified materials, which is sufficient.

Relators further argue that a "revolving door of employment" exists between the DOE and its contractors which prevents the DOE from providing effective oversight of the contractors' work at Rocky Flats, and which motivates the DOE to take actions that improperly favor the contractors, such as persuading the DOJ to dismiss this action. There was evidence that several persons who are currently employed by the DOE were formerly employed by one of the contractor defendants, and vice-versa, including Paul Golan who was formerly employed by defendant EG&G. (Owendoff, Golan testimony) There was no evidence, however, that DOE officials persuaded the DOJ to dismiss this action to protect former or current DOE officials' pecuniary interests in current or future employment with the contractors, or that DOE officials colluded with the contractors to seek dismissal of this action. Further, the evidence showed that it is not unusual for persons whose field of expertise is common to both government and private industry to work in both the private and public sectors. For example, relator David Ridenour worked for a DOE contractor in Ohio before he was employed by the DOE at Rocky Flats. (Ridenour testimony) The relators' contention is without merit.

The relators' primary argument is that the motion to dismiss was filed for the fraudulent purpose of shielding the DOE from embarrassment which the agency would suffer if the contractors' alleged security violations, and the asserted lack of appropriate oversight by the DOE, are brought to light. In support of their contention, the relators presented testimony from former DOE officials Colonel Edward McCallum and Peter Stockton, and Ron Timm, a former DOE contractor.

Edward McCallum, former director of Safeguards and Security for the DOE between 1990 and 1999, participated in the validation and verification of SSSPs and rated security at DOE sites. (McCallum testimony) In 1997, Ron Timm, president of RETA Security, Inc., a DOE contractor providing base support for vulnerability analyses for the Office of Safeguards and Security, formed a quality assurance team to analyze the SSSPs at eleven DOE sites, including Rocky Flats. (Timm testimony) Timm's quality assurance team reviewed Rocky Flats security documents and made findings of deficiencies which Timm reported to McCallum. (Timm testimony) McCallum then reported Timm's findings to the DOE/Rocky Flats field office. (McCallum testimony) Timm visited Rocky Flats in the Summer of 1999 to conduct a quality assurance investigation and discovered some of the same deficiencies which he reported in 1997. (Timm testimony) The deficiencies were then corrected within ninety days. (Timm testimony) Timm and McCallum testified that even though DOE knew about security deficiencies at Rocky Flats in 1997 which were not corrected for two years, DOE officials made public statements during that time that security at Rocky Flats was adequate.

McCallum also testified that relator Peters voiced concerns to him about security at Rocky Flats in 1996-97.

McCallum attempted to conduct an on-site investigation, but was prevented from doing so for a one-month period by higher-ranking officials within the DOE. (McCallum testimony) By the time he was allowed to visit the Rocky Flats site, too much time had passed for him to conduct a meaningful investigation. (*Id.*) McCallum reported his concerns about security deficiencies at Rocky Flats to the Secretary of Energy, the Assistant Secretary of Energy, and Congress. (*Id.*) McCallum testified that the Secretary of Energy attempted to prevent him from testifying before a Congressional committee about the security deficiencies at Rocky Flats. McCallum's opinion is that DOE did not provide effective oversight of the contractors during the 1990's. McCallum also testified that the DOE and DOJ never asked him his opinion about the merits of the qui tam suit when the Government was investigating the relators' allegations.

Peter Stockton was the Special Assistant to DOE Secretary Richardson between March 1999 and January 2001. Stockton's duties in that capacity included evaluating the physical security at Rocky Flats and other weapons manufacturing facilities. (Stockton testimony) At the direction of Secretary Richardson, Stockton sent a quality assurance team to Rocky Flats to investigate the status of security there, during the Summer of 1999. (*Id.*) Security deficiencies were discovered during the course of the investigation. (*Id.*) When Stockton advised DOE/Rocky Flats field office personnel of the deficiency findings, the field office acknowledged some of the noted deficiencies, but denied others. (*Id.*) A few weeks later, Colonel Habiger, the DOE's head of safeguards and securities, visited Rocky Flats, but the field office staff did not apprise Habiger of the security violations which had been found by the quality assurance team a few weeks earlier. (*Id.*) Stockton testified that neither the DOE general counsel, nor the DOJ, interviewed him before filing the motion to dismiss.

Timm wrote a letter to General Habiger, dated January 5, 2000, with which Stockton concurred, claiming that certain DOE officials had lied in reporting the actual status of security at Rocky Flats and other DOE sites, and that he and other persons on his quality assurance team had been retaliated against by the DOE for reporting security deficiencies. (Relators' Ex. 11; Timm testimony) Upon receipt of Timm's letter, General Habiger ordered the DOE Inspector General to investigate Timm's allegations. (Timm testimony) The Inspector General conducted an investigation and issued a Summary Report on Allegations Concerning the Department of Energy's Site Safeguards and Security Planning Process on September 28, 2000. (Government's Ex. Z) The Summary Report stated that the inspection findings did not support Timm's allegations that DOE officials lied in reporting the actual status of security at DOE's nuclear sites, or that persons who assisted Stockton suffered retaliation for their role in reviewing SSSPs. (*Id.* at pp. 2, 4 and 5) The inspection team did find substantial differences between what Timm's quality assurance team reported as the actual status of security at the DOE sites and what the DOE sites had reported, and bitter disagreements between DOE field offices and headquarters over the interpretation of fundamental issues underlying the basis of the SSSP such as the design basis threat, adversary capabilities and the assumptions related to worst case scenarios. (*Id.* at p.2) The inspection team attributed the problems to the manner in which SSSPs were reviewed during the period referred to in Timm's allegations. (*Id.* at pp. 2-3) The inspection team recommended a restructuring of the SSSP process in order to involve both DOE field office and headquarters personnel in the SSSP from the outset, thereby eliminating the need for a "'post facto' QA function." (*Id.* at pp. 3-4)

Timm and Stockton disagreed with the findings of the Inspector General's Summary Report, while General Habiger concurred with the Report. (Timm, Stockton testimony) On February 9, 2001, after the IG report was issued, Timm wrote a letter to President Bush's appointee, Secretary of Energy Abraham, raising his concerns about security deficiencies at Rocky Flats. (Timm testimony; Relators' Ex. 11) Timm received a response from Glenn Podonsky, Director of the DOE Office of Independent Oversight, which was one of the groups Timm had accused of misrepresenting the status of security in his January 2000 letter to General Habiger. (Timm testimony; Government's Ex. AA) Podonsky disagreed with Timm's position that SNM at DOE sites was at undue risk and stated that the quality assurance process in which Timm participated "suffered from low credibility among many security professionals in the Department and that some of the tools and techniques [Timm] employed are considered inappropriate or improperly applied to the SSSP quality assurance process." (Government's Ex. AA, Attachment, p. 1)

The relators argue that certain officials in the DOE have consistently attempted to cover up security violations at Rocky Flats and that the dismissal of this lawsuit is a part of that cover up. Relators maintain that the DOE, a client of the DOJ, misled the DOJ about the merits of the relators' allegations in the Second Amended Complaint during the DOJ's investigation of relators' claims, causing the DOJ to make a misinformed decision to dismiss this action. Relators emphasize that because McCallum was the DOE director of Safeguards and Security between 1990 and 1999, and Stockton was a special assistant to Secretary Richardson during the time the DOJ investigated the relators' allegations, the DOJ's failure to interview those individuals prior to filing the motion to dismiss demonstrates that certain officials in the

DOE were able to prevent the DOJ from consulting with the persons most knowledgeable about security at Rocky Flats.

The evidence does not support the cover up alleged by relators. The evidence was that three individuals involved in the validation and verification of SSSPs reported security deficiencies at Rocky Flats in 1997 and 1999 which were either not corrected or were corrected in a dilatory fashion, while at the same time, the DOE was making public statements that security at Rocky Flats was adequate. The evidence also showed, however, that some DOE officials disagreed with the opinions of McCallum, Stockton and Timm. Clearly, there was disagreement between the DOE site offices, DOE headquarters, and the independent oversight offices about the status of security at Rocky Flats during the mid to late 1990's; however, a disagreement does not prove a cover up.

The evidence further shows that McCallum, Stockton and Timm reported the alleged security deficiencies to various groups within the DOE, to Congress and to the press. Timm's allegations were not covered up, but were investigated by the Inspector General. The fact that Timm and Stockton disagreed with the results of that investigation does not prove a cover up.

Relators provided no evidence that the DOE influenced the DOJ's decision to dismiss this action so that the DOE could avoid possible embarrassment over allegedly ineffective oversight of security at Rocky Flats. Even though the DOJ consulted with DOE officials, such as Paul Golan, about the dismissal of this action, there was no evidence that the DOJ did not exercise its independent judgment in deciding to file the dismissal motion. Further, there was no evidence that the defendant contractors unduly or improperly influenced the

decision to file the motion to dismiss. The only evidence on the issue was Paul Golan's testimony that no agents or employees of the defendants were present at any of his meetings with DOE general counsel or DOJ attorneys to discuss dismissal of this action.

The court further finds that the relators presented no persuasive evidence to support their assertions that the DOE uses classification as an excuse to prevent embarrassing information from being disclosed to the public. Additionally, there was no evidence that the dismissal motion was the product of bribery, extortion or coercion by the defendants.

The relators have failed to demonstrate that the United States' Motion to Dismiss is illegal, arbitrary and capricious, brought for a fraudulent purpose, or is the product of undue influence by the defendants.

Finally, the court addresses two policy issues raised by the relators. First, relators contend that by dismissing this action, the Government is sending a message that its contractors can defraud the Government with impunity. Second, relators maintain that if the Government is allowed to dismiss a qui tam case at any point in the litigation just because classified information is involved, or because litigation of the case will interfere with the contractors' work, private enforcement actions under the False Claims Act will be quelled, contrary to the intent of Congress in enacting the qui tam provisions as an important tool to combat fraud.

Remediation of fraud in government contracts is important to both federal agencies and the taxpayers, as evidenced by Congressional enactment of the qui tam provisions to combat such fraud. Notwithstanding, the Government, not the relators, is the real-party-in-interest in a qui tam action. The

Government successfully argued that the DOJ made a rational policy choice that the potential recovery of millions of dollars in damages against the defendants in this action is outweighed by the Government's greater interests in the timely closure of Rocky Flats and protection of national security. There was no evidence to show that the DOJ engages in a regular practice of dismissing qui tam actions after the initial intervention period has passed. The private enforcement of False Claims Act cases benefits the Government by allowing the Government to recover the lions share of any monetary remedy realized, while private citizens expend the resources to prosecute the litigation. Despite the benefits which qui tam actions confer on the Government and the public, there are instances when those benefits are outweighed by other legitimate governmental interests. A Government decision to dismiss a qui tam action to serve a greater public interest is appropriate as long as dismissal advances the legitimate governmental interests articulated by the Government, and the dismissal is not otherwise illegal, arbitrary and capricious, fraudulent, or the product of undue influence by the defendants.

Because the United States has satisfied its burden under *Sequoia Orange* to show that dismissal of this action will advance the legitimate governmental interests in protection of the national security and the timely closure of Rocky Flats, and the relators have failed to satisfy their burden to demonstrate that dismissal is illegal, arbitrary and capricious, fraudulent, or the product of undue influence by the defendants, the court recommends that Counts One and Two of the Second Amended Complaint be dismissed.

III.

For the reasons set forth herein, it is

RECOMMENDED that the United States' Motion to Dismiss [filed August 21, 2000] be GRANTED. It is

RECOMMENDED that Counts One and Two of the Second Amended Complaint be DISMISSED WITH PREJUDICE. It is

FURTHER RECOMMENDED that defendants be ordered to file an Answer or responsive pleading to Count Three of the Second Amended Complaint, for unlawful retaliation under 31 U.S.C. § 3730 (h), within twenty (20) days after the District Judge enters an order on the instant Recommendation.

Within ten days after being served with a copy of the proposed findings and recommendation, any party may serve and file written objections to the proposed findings and recommendation with the Clerk of the United States District Court for the District of Colorado. The district court judge shall make a de novo determination of those portions of the proposed findings or specified recommendation to which objection is made. The district court judge may accept, reject, or modify, in whole or in part, the proposed findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

Failure to make timely objections to the magistrate judge's recommendation may result in a waiver of the right to appeal from a judgment of the district court based

on the findings and recommendations of the magistrate judge.

Dated this 7 day of August, 2001.

BY THE COURT:

PATRICIA A. COAN
United States Magistrate Judge